

Murdoch University  
School of Law

NO-INVALIDITY CLAUSES IN MODERN AUSTRALIAN JURISPRUDENCE:  
AVOIDING ISLANDS OF POWER IMMUNE FROM SUPERVISION AND  
RESTRAINT

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## DECLARATION

This thesis contains no material which has been accepted for the award of any other degree or diploma in any other University. Further, to the best of my knowledge or belief, this thesis contains no material previously published or written by another person except where due reference is made in the text.

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Ethan Anthony Heywood

## ABSTRACT

Section 75(v) of the *Constitution* gives the High Court original jurisdiction in all matters in which a ‘writ of mandamus, prohibition and injunction is sought against an officer of the Commonwealth.’ In *Plaintiff S157/2002 v The Commonwealth*, the High Court held that s 75(v) of the *Constitution* entrenched a minimum provision of judicial review. The preservation of a minimum provision of judicial review means that legislative restrictions on the High Court’s s 75(v) jurisdiction are severely limited. The Court has made it clear that intrusion upon this minimum provision of judicial review is a question of substance and therefore degree. The privative clause, the historically preferred weapon of choice to limit judicial oversight, has been rendered largely ineffective by ‘creative’ approaches to interpretation. A consequence of the ineffectiveness of privative clauses has been the rise in the use of no-invalidity clauses. A no-invalidity clause is a provision in legislation that preserves the validity of a decision despite failure to adhere to the requirements in the legislation. By making a claim as to the validity of a decision, despite non-compliance with legislative requirements, the no-invalidity clause attempts to bring errors made by an administrative decision maker within jurisdiction. Classifying legal errors as non-jurisdictional arguably circumvents the exercise of the High Court’s s 75(v) jurisdiction to conduct judicial review, which is only available to correct jurisdictional errors of law. This would, at least superficially, appear to impede the jurisdiction of the High Court to conduct judicial review under its s 75(v) jurisdiction, at least in substance.

In the 2008 High Court decision of *Federal Commissioner of Taxation v Futuris Corporation Ltd*, the High Court gave effect to a broad no-invalidity clause in s 175 of the *Income Tax Assessments Act 1939* (Cth). Section 175 purported to make an income tax assessment valid notwithstanding any failure to adhere to the requirements laid out in the legislation. This conclusion is difficult to reconcile with the High Court’s broader jurisprudence on s 75(v), notably, the intention of the Court to look to substance and not form. However, an exploration of the High Court’s jurisprudence on the entrenched minimum provision of judicial review reveals that these concerns may be misguided. This thesis will explore key case law surrounding privative and no-invalidity clauses with the hope of rationalising the underlying approach that lends meaning to the minimum provision of judicial review. Once this is achieved, a more complete picture of the High Court’s decision in *Federal Commissioner of Taxation v Futuris Corporation Ltd*, and the approach to no-invalidity clauses generally, can be better understood.

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## I. INTRODUCTION

Section 75(v) of the *Constitution* gives the High Court of Australia<sup>1</sup> original jurisdiction in all matters in which a ‘writ of mandamus, prohibition and injunction is sought against an officer of the Commonwealth’.<sup>2</sup> In *Plaintiff S157/2002 v The Commonwealth* (‘*Plaintiff S157*’),<sup>3</sup> the High Court held that the preservation of the power to issue the remedies in s 75(v) entrenched a minimum provision of judicial review in the *Constitution*.<sup>4</sup> Judicial review is the process by which a superior court can review exercises of administrative, judicial or executive power to make sure it was exercised in accordance with the law.<sup>5</sup> The preservation of a constitutional jurisdiction to conduct judicial review has placed a significant obstacle in the path of legislative attempts to insulate administrative decisions from judicial review.

The most common and well-known method of limiting judicial review is through the use of a privative clause.<sup>6</sup> Privative clauses are clauses that deprive, or purport to deprive, the courts of jurisdiction to review the acts of public officials, tribunals or courts.<sup>7</sup> These clauses have been rendered largely ineffective by a process of statutory construction that will be explored in Chapter II. The ineffectiveness of privative clauses has meant that the legislature has had to be more creative, resulting in the use of no-invalidity clauses. A no-invalidity clause is a clause that provides that non-compliance with a statutory requirement will not result in the invalidity of the decision.<sup>8</sup> A no-invalidity clause operates to classify legal errors as falling within the jurisdiction of the decision maker.<sup>9</sup> Classifying legal errors

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<sup>1</sup> Referred to throughout this thesis as ‘the High Court’ and ‘the Court’ interchangeably.

<sup>2</sup> *Australian Constitution* s 75(v).

<sup>3</sup> (2003) 211 CLR 476.

<sup>4</sup> *Ibid* 513 [103] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

<sup>5</sup> Robin Creyke and John McMillan, *Control of Government Action: Text, Cases and Commentary* (Lexis Nexis Butterworths, 3<sup>rd</sup> ed, 2012) 41.

<sup>6</sup> Will Bateman, ‘The *Constitution* and the substantive principles of judicial review: The full scope of the entrenched minimum provision of judicial review’ (2011) 39 *Federal Law Review* 463, 463.

<sup>7</sup> Nicholas Gouliaditis, ‘Privative Clauses: Epic Fail’ (2010) 34(3) *Melbourne University Law Review* 870, 870.

<sup>8</sup> Leighton McDonald, ‘The entrenched minimum provision of judicial review and the rule of law’ (2010) 21 *Public Law Review* 14, 15; Charles Noonan, ‘Section 75(v), No-invalidity clauses and the Rule of Law’ (2013) 36(2) *University of New South Wales Law Journal* 437, 458; Giridhar Kowtal, ‘Jurisdictional error and no-invalidity clauses at State level: Does the High Court still hold all the cards?’ (2015) 22 *Australian Journal of Administrative Law* 253, 253.

<sup>9</sup> *Harvey v Commissioner of State Revenue* [2015] QCA 258, 283-4 [77]-[79] (McMurdo P, with whom Philippides JA and Burns J agreed).

as non-jurisdictional prevents the High Court from reviewing the decision by effectively removing the reviewable error.<sup>10</sup>

At the Federal level, no-invalidity clauses prevent judicial review by circumventing the High Court's jurisdiction to review exercises of public power under s 75(v). In doing so, no-invalidity clauses have the potential to insulate Commonwealth administrative decisions from judicial oversight. Without judicial oversight, there is a potential for administrative decision makers to exercise their power with boundaries that are no longer enforceable.

This thesis will centre around the recent High Court decision in *Federal Commissioner of Taxation v Futuris Corporation Ltd* ('Futuris').<sup>11</sup> In this decision, the High Court gave effect to a broad no-invalidity clause in the *Income Tax Assessments Act 1936* (Cth) (the 'Tax Act').<sup>12</sup> The no-invalidity clause in *Futuris*, s 175 of the Tax Act, was broad. It purported to validate decisions notwithstanding any failure to comply with the requirements laid out in the Tax Act:<sup>13</sup>

The validity of any [taxation] assessment shall not be affected by reason that any of the provisions of this Act have not been complied with.

Unsurprisingly, the decision to give effect to s 175 has raised concern amongst commentators that no-invalidity clauses pose a threat to the rule of law in Australia.<sup>14</sup> Some commentators have gone as far as to say that the indirect assault on the Court's ability to conduct judicial review is more effective than targeting it directly, for example, with a privative clause.<sup>15</sup>

It will be demonstrated, in Chapter III, that the High Court has made a clear commitment to rely upon substance, not form, to determine if its s 75(v) jurisdiction is impeded. That is, the Court will look at the practical impact of the law and the degree to which it restricts judicial review, rather than just its literal form. In substance, no-invalidity clauses appear to intrude upon the minimum provision of judicial review by circumventing the operation of s 75(v). *Futuris* is difficult to reconcile with this approach. Section 175 of the Tax Act appears to insulate decisions under the Tax Act from review. As

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<sup>10</sup> The manner in which no-invalidity clauses preclude review is explored in detail in Part B of this chapter, specifically Part B.3 which identifies and explains the 'no-invalidity clause problem'.

<sup>11</sup> (2008) 237 CLR 146.

<sup>12</sup> Ibid 157 (Gummow, Hayne, Heydon and Crennan JJ).

<sup>13</sup> *Income Tax Assessment Act 1936* (Cth) s 175.

<sup>14</sup> See, eg, McDonald, above n 8, 24; Peter Cane and Leighton McDonald, *Principles of Administrative Law: Legal Regulation of Governance* (Oxford University Press, 2<sup>nd</sup> ed, 2008) 209; Mark Aronson, 'Commentary on "The Entrenched Minimum Provision of Judicial Review and the Rule of Law" by Leighton McDonald' (2010) 21 *Public Law Review* 35, 36.

<sup>15</sup> Cane and McDonald, above n 14, 209; Gouliaditis, above n 7, 880; see generally, Mark Aronson, Bruce Dyer and Matthew Groves, *Judicial Review of Administrative Action* (Thomson Reuters, 4<sup>th</sup> ed, 2009) 959-64.



such, it is difficult to ascertain how the High Court has informed its understanding of the boundaries of the minimum provision of judicial review. The Court has done little to provide clarity on the question.<sup>16</sup>

This thesis will examine the judicial treatment of privative and no-invalidity clauses, and attempt to draw out a principled approach to understand the extent of the minimum provision of judicial review. Once an appropriate approach to lend meaning to the minimum provision of judicial review, that is consistent with the Court's jurisprudence, is ascertained, the decision of *Futuris* and no-invalidity clauses more broadly can be placed in perspective. This thesis will argue that the most appropriate approach is the rule of law, as the requirement that government is subject to the law, in concert with a broader approach to administrative accountability.<sup>17</sup> This approach requires reading broadly cast no-invalidity clauses more restrictively in circumstances where no other adequate means of oversight and accountability are in place. A more restrictive reading of no-invalidity clauses reflects an application of the narrow approach to construction,<sup>18</sup> which is ultimately consistent with the *Constitution* and preserves any threat to the rule of law.

#### A      *The scope and structure of this thesis*

The aim of this thesis is to assist the reader to develop an understanding of the operation of the underlying principle that appears to inform the scope of the minimum provision of judicial review. Enabling the reader to develop a more complete understanding of the operation of no-invalidity clauses at the Federal level. It will then be possible to better contemplate the High Court's approach in *Futuris*. A sounder understanding of the Court's underlying rationale will demonstrate that no-invalidity clauses do not pose as large of a threat to the rule of law as first appears. The scope of this thesis is limited to the operation of no-invalidity clauses in the context of judicial review of administrative decision making. It will not consider their operation in any other context.<sup>19</sup> The constraints associated with writing a thesis of only 20,000 words necessitate a limitation on the material that can be included. Consequently, this thesis will deal with the Federal jurisdiction. However, the jurisprudence on

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<sup>16</sup> Jeremy Kirk, 'The entrenched minimum provision of judicial review' (2004) 12 *Australian Journal of Administrative Law* 64, 64; Bateman, above n 6, 463; Cheryl Saunders, 'Plaintiff S157/2002: A Case-Study in Common Law Constitutionalism' (2005) 12 *Australian Journal of Administrative Law* 115, 124.

<sup>17</sup> This approach is explored in detail and measured against other approaches (such as using jurisdictional error as the underlying principle) in Chapter IV.

<sup>18</sup> The phrase 'narrow approach to construction' refers to applying a narrow interpretation to legislative restrictions on judicial review, and has been adopted from the judgment of Edelman J in *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* (2018) 92 ALJR 248 ('*Probuild*') for its clarity and simplicity. It is explored and applied to the 'no-invalidity clause problem' in Chapter V.

<sup>19</sup> For example, judicial review has a role to play in the review of decisions of inferior courts (indeed, this was the original purpose for which judicial review was employed) and the exercise of some powers of the executive. These forms of review are not the subject of this thesis.

privative and no-invalidity clauses heavily overlaps between the State and Federal levels. The parity in approach has meant that the rationale and principles of interpretation are common to both.<sup>20</sup>

The conception of the rule of law that is being adopted for the purposes of this thesis is a narrow, formal conception. Any reference to the rule of law is concerned only with the idea that government must be subject to the law and that it is the role of the judiciary to determine what that law is.<sup>21</sup> Additionally, this thesis does not claim to make any normative statement about the law; the purpose of this thesis is descriptive. The ultimate aim is to explain the interpretation of no-invalidity clauses, not to make any value judgment of the law as it stands. Finally, the constitutional injunction will not form part of the analysis of this thesis. The injunction in s 75(v) is distinct from the constitutional writs and may not require jurisdictional error as a pre-requisite to its availability.<sup>22</sup>

This chapter contains the introductory remarks, delimits the scope of the paper and provides essential background. Chapter II will explore the judicial treatment of privative and no-invalidity clauses. Chapter III asks whether no-invalidity clauses are expressly inconsistent with s 75(v). There is no express inconsistency, a no-invalidity clause deals with subject matter distinct from the grant of jurisdiction in s 75(v). Chapter III also explores the High Court's willingness to look to substance over form in considering whether the minimum provision of judicial review is impeded. As the question is one of substance, it indicates that something more than the literal words in the legislation is informing the High Court's approach. As such, an exploration of the scope of the minimum provision of judicial review is necessary.

Chapter IV will address the need to give scope to the minimum provision of judicial review by exploring the merits of jurisdictional error, the rule of law and the broader context of administrative accountability. It will be demonstrated that the principle best placed to inform our understanding of the minimum provision of judicial review is the rule of law, in concert with a broader approach to administrative accountability. Chapter V will examine the application of the narrow approach to construction, that will restrict the effectiveness of no-invalidity clauses in circumstances where no alternative means of administrative accountability are present.

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<sup>20</sup> *Plaintiff S157* (2003) 211 CLR 476, 483 [7] (Gleeson CJ).

<sup>21</sup> This conception of the rule of law should be recognisable as the most commonly understood and accepted aspect of the rule of law, an aspect that is often attributed to AV Dicey, see generally, A V Dicey, *An Introduction to the Study of the Law of the Constitution* (MacMillan, 10<sup>th</sup> ed, 1959).

<sup>22</sup> For discussion of the inclusion and use of the injunction as a remedy in s 75(v) of the *Constitution*, including whether it requires jurisdictional error for its availability, see generally, Benjamin O'Donnell, 'Jurisdictional error, invalidity and the role of the injunction in s 75(v) of the *Constitution*' (2007) 28 *Australian Bar Review* 291; William Gummow, 'The scope of s 75(v) of the *Constitution*: Why injunction but no certiorari?' (2014) 42(2) *Federal Law Review* 241.

## B Background

The purpose of this part is to provide background to some fundamental concepts. Including, first, a discussion of the entrenched minimum provision of judicial review, which will also provide background on judicial review and s 75(v) generally. Second, the distinction between and significance of, jurisdictional and non-jurisdictional error of law. Last, this part will draw on the preceding discussion and explain the no-invalidity clause problem.

### 1 *The entrenched minimum provision of judicial review*

As explained in the introduction to this thesis, s 75(v) gives the High Court original jurisdiction in all matters in which a ‘writ of mandamus, prohibition or injunction is sought against an officer of the Commonwealth.’<sup>23</sup> The High Court has said that this original jurisdiction entrenches a ‘minimum provision of judicial review’.<sup>24</sup> A similar result has been achieved at State level.<sup>25</sup> The constitutional status of judicial review means that it cannot be revoked by ordinary legislation.<sup>26</sup> However, the extent to which judicial review is entrenched in the *Constitution* remains unclear.<sup>27</sup> A significant component of this thesis is devoted to delineating a basis for ascertaining that extent. It is necessary to do so in order to determine how no-invalidity clauses interact with s 75(v).

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<sup>23</sup> *Australian Constitution* s 75(v). What amounts to an ‘officer of the Commonwealth’ is not a closed category, it includes members of Federal tribunals: see generally, *Re Cram; Ex parte New South Wales Colliery Proprietors Association Ltd* (1987) 163 CLR 117; and it extends to Federal judges: *In Re Gray; Ex parte Marsh* (1985) 157 CLR 351, 385 (Deane J); *R v Watson; Ex parte Armstrong* (1976) 136 CLR 248, 263 (Barwick CJ, Gibbs, Stephen and Mason JJ).

<sup>24</sup> *Plaintiff S157* (2003) 211 CLR 476, 513 [103] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ); see also *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 77 ALJR 1165, 1170 [27] (McHugh and Gummow JJ), 1190 [153] (Kirby J); *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651, 668-669 [45]-[46] (Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ) (‘*Bodruddaza*’); *Hossain v Minister for Immigration and Border Protection* (2018) 92 ALJR 780 [20] (Kiefel CJ, Gageler and Keane JJ).

<sup>25</sup> The entrenched minimum provision of judicial review at State level has its foundation in s 73 of the *Constitution* which requires that each State have a body resembling a Supreme Court, a fundamental characteristic of which is the jurisdiction to supervise inferior courts and tribunals and to correct jurisdictional errors of law, see generally, *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531 (‘*Kirk*’).

<sup>26</sup> *Plaintiff S157* (2003) 211 CLR 476, 482-3 (Gleeson CJ), 513 (Gaudron, McHugh, Gummow, Kirby and Hayne JJ); *Graham v Minister for Immigration and Border Protection* (2017) 91 ALJR 890, 902 (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ) (‘*Graham*’); *R v Coldham; Ex parte Australian Worker’s Union* (1983) 153 CLR 415, 418 (Mason ACJ and Brennan J) (‘*Coldham*’); *Bank of New South Wales v The Commonwealth* (1948) 76 CLR 1, 363 (Dixon J) (‘*Bank of New South Wales*’).

<sup>27</sup> *Kirk*, above n 16, 64; *Bateman*, above n 6, 463; *Saunders*, above n 16, 124.

In *Plaintiff S157*, the Court noted that s 75(v) provided reinforcement for the rule of law in Australia by ensuring that executive action was lawful and fell within jurisdiction.<sup>28</sup> As such, the importance of s 75(v) as a safeguard for the rule of law in Australia cannot be overstated.<sup>29</sup> Ensuring the lawfulness of executive action is the accountability function of s 75(v). It operates to ensure administrative decision makers are held to the jurisdiction conferred upon them. The accountability function of s 75(v) was one of several reasons for its inclusion in the *Constitution*.<sup>30</sup> James Stellios, relying upon the Convention Debates, has identified three main reasons for the inclusion of s 75(v) in the *Constitution*. Section 75(v) was intended, first, as an allocation of jurisdiction,<sup>31</sup> second, to ensure Commonwealth officers were proceeded against in a Federal court,<sup>32</sup> and third, as an accountability mechanism.<sup>33</sup>

Since Federation, the accountability function has come to pass as the primary and most recognisable function of s 75(v). In *Plaintiff S157*, Gleeson CJ emphasized the importance of this accountability function.<sup>34</sup> The Chief Justice highlighted the remarks of Edmund Barton, made in Melbourne during the Convention Debates.<sup>35</sup> Barton referred to s 75(v) as giving a citizen the opportunity:<sup>36</sup>

[T]o obtain the performance of a clear statutory duty, or to restrain an officer of the Commonwealth from going beyond his duty, or to restrain him in the performance of some statutory duty from doing some wrong.

Accordingly, the inclusion of s 75(v) in the *Constitution* was specifically calculated to ensure the accountability of officers of the Commonwealth in the exercise of their public function. For this reason, s 75(v) has never been understood to apply only to maintaining observance of constitutional limitations on executive and legislative power. Rather, s 75(v) preserves a jurisdiction capable of restraining

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<sup>28</sup> *Plaintiff S157* (2003) 211 CLR 476, 482-3 [5] (Gleeson CJ, 513-514 [103]-[104] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ); *Graham* (2017) 91 ALJR 890, 902 (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).

<sup>29</sup> *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372, 438 (Kirby J); *Haneef v Minister for Immigration and citizenship* (2007) 161 FCR 40, 44 (Spender J).

<sup>30</sup> James Stellios, 'Exploring the purposes of s 75(v) of the *Constitution*' (2011) 34 *University of New South Wales Law Journal* 70, 72.

<sup>31</sup> Section 75(v) as an allocation of jurisdiction was motivated by the intention to prevent the High Court experiencing the same problem as was experienced in *Marbury v Madison* (1803) 5 US 137 where the United States Supreme Court found that it had no power to issue the writ of mandamus to a Federal officer because it had no jurisdiction (the jurisdiction had not been provided for in the *United States Constitution*).

<sup>32</sup> *Official Record of the Convention Debates of the Australasian Federal Convention*, Melbourne, 4 March 1898, 1879 (Josiah Symon): it would be 'cumbrous and undesirable if an officer of the Commonwealth could be proceeded against in a State court'.

<sup>33</sup> Stellios, above n 30, 72.

<sup>34</sup> *Plaintiff S157* (2003) 211 CLR 476, 482-3 [5] (Gleeson CJ).

<sup>35</sup> *Ibid.*

<sup>36</sup> *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 4 March 1898, 1884-5 (Edmund Barton).

officers of the Commonwealth from exceeding Federal power generally.<sup>37</sup> The writs may issue to restrain administrative decision makers empowered by Federal acts of parliament.<sup>38</sup> In this way, s 75(v) entrenches a jurisdiction that operates to preserve the observance of the rule of law by public bodies in Australia in general. The jurisdiction to issue the public law remedies is often referred to as supervisory jurisdiction. The exercise of supervisory jurisdiction is how superior courts maintain accountability. Supervisory jurisdiction refers to the review of an exercise or purported exercise of administrative, executive or judicial power and to grant relief in the nature of certiorari,<sup>39</sup> prohibition,<sup>40</sup> and mandamus<sup>41</sup> where jurisdictional error is found.<sup>42</sup> The High Court also has, under its original jurisdiction conferred by s 75(v), jurisdiction to issue injunction.<sup>43</sup>

Traditionally, superior courts have had jurisdiction to supervise inferior courts, tribunals and the executive.<sup>44</sup> Indeed, it is a principle taken as axiomatic in Australian law.<sup>45</sup> The inclusion of prohibition and mandamus in the *Constitution* has resulted in their classification as the ‘constitutional writs’.<sup>46</sup> They

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<sup>37</sup> *Bank of New South Wales* (1948) 76 CLR 1, 363 (Dixon J).

<sup>38</sup> *Bodruddaza* (2007) 228 CLR 651, 668-669 [46] (Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ).

<sup>39</sup> The writ of certiorari commands an inferior court to certify its record of proceedings and allows the superior court to quash those proceedings for error of law. Its origins and development are disputed. For discussion of its development and use, see generally, SA de Smith, ‘The prerogative writs’ (1951) 11(1) *Cambridge Law Journal* 40, 45-7; Edith Henderson, *Foundations of English Administrative Law: Certiorari and Mandamus in the seventeenth century* (Harvard University Press, 1963) 84-6.

<sup>40</sup> The writ of prohibition restrains an inferior court from exceeding its powers. For discussion of its development and use, see generally, Clare Langford, ‘The prerogative writs and the origins of English Administrative law’ (2014) 88 *Australian Law Journal* 567.

<sup>41</sup> The writ of mandamus issues to compel a public officer or body to perform a legal obligation. For discussion of its development and use, see generally, Langford, above n 40.

<sup>42</sup> *Plaintiff S157* (2003) 211 CLR 476, 506 [76] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ); *Futuris* (2008) 237 CLR 146, 62 (Gummow, Hayne, Heydon and Crennan JJ); *Graham* (2017) 91 ALJR 890, 913 [102] (Edelman J); see also, *Kirk* (2010) 239 CLR 531, [98] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

<sup>43</sup> *Commonwealth Constitution of Australia* s 75(v). This thesis will not explore the constitutional injunction, for discussion of the inclusion and use of the injunction as a remedy in s 75(v) of the *Constitution*, including whether it requires jurisdictional error for its availability, see generally, Benjamin O’Donnell, ‘Jurisdictional error, invalidity and the role of the injunction in s 75(v) of the *Constitution*’ (2007) 28 *Australian Bar Review* 291; William Gummow, ‘The scope of s 75(v) of the *Constitution*: Why injunction but no certiorari?’ (2014) 42(2) *Federal Law Review* 241.

<sup>44</sup> Creyke and McMillan, above n 5, 911.

<sup>45</sup> *Probuild* (2018) 92 ALJR 248 [33] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ); *Attorney-General (NSW) v Quin* (1990) 194 CLR 355 [69] (Brennan J); *Craig v South Australia* (1995) 184 CLR 163, 175-6 (Brennan, Deane, Toohey and Gaudron JJ); *SZFDE v Minister for Immigration and Citizenship* (2007) 232 CLR 189, 196-7 [17] (Gleeson CJ, Gummow, Kirby, Hayne, Callinan, Heydon and Crennan JJ).

<sup>46</sup> *Re Refugee Tribunal; Ex parte Aala* (2000) 204 CLR 82, 92-3 [21] (Gaudron and Gummow JJ), 118 [86] (McHugh J), 135-6 [144] (Kirby J), 141-2 [165] (Hayne J) (*‘Aala’*). It should be noted that this is likely to be more than a semantic difference, the operation of the writs may be different to their predecessors, unfortunately the constraints imposed on this thesis prevent an exploration of this difference.

are only available to correct jurisdictional error.<sup>47</sup> Certiorari is also available under s 75(v), but only as ancillary relief and is vulnerable to legislative exclusion.<sup>48</sup> The High Court exercises, through these remedies, a constitutional jurisdiction to conduct judicial review. Judicial review is the review of a decision to make sure it was taken within the jurisdiction conferred upon the decision maker.<sup>49</sup> In this way, judicial review is concerned with the enforcement of the rule of law.<sup>50</sup> Although this offers protection of individual rights, judicial review is not to be understood by reference to the protection of those rights.<sup>51</sup> The scope of judicial review must be defined in terms of the power conferred and the legality of its exercise.<sup>52</sup> As such, judicial review enforces the rule of law on public officers and bodies by ensuring that decisions are taken in accordance with the power conferred upon them.

Section 75(v)'s role in the preservation of the rule of law is informed by its underlying place and purpose in the *Constitution*.<sup>53</sup> The High Court has made clear that where the place and purpose of s 75(v) is under threat, it will read down or invalidate legislative provisions.<sup>54</sup> The purpose of s 75(v) is to provide a jurisdiction capable of ensuring Commonwealth administrative decision makers remain within the jurisdiction conferred upon them.<sup>55</sup> The place of s 75(v) in the constitutional structure also has a role to play in maintaining the accountability function of s 75(v). The place of s 75(v) in the *Constitution* requires that judicial power only be exercised by a Chapter III Court.<sup>56</sup> In the seminal United States Supreme Court decision of *Marbury v Madison*,<sup>57</sup> Marshall CJ observed that it is emphatically 'the

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<sup>47</sup> See generally, *Plaintiff S157* (2003) 211 CLR 476.

<sup>48</sup> *Ibid* 507 [80] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ); *Aala* (2000) 204 CLR 82, 90-91 [14] (Gaudron and Gummow JJ); *Re McBain; Ex Parte Bishops Australian Catholic Bishops Conference* (2002) 209 CLR 372, 393-394 [19] (Gleeson CJ), 403 [55] (Gaudron and Gummow JJ) and 440-441 [176] (Kirby J).

<sup>49</sup> *Church of Scientology v Woodward* (1982) 154 CLR 25, 70 (Brennan J) ('*Church of Scientology*').

<sup>50</sup> *Ibid*.

<sup>51</sup> *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 36 (Brennan J).

<sup>52</sup> *Ibid*.

<sup>53</sup> *Graham* (2017) 91 CLR 890, 902 [42]-[44] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ); *Bodruddaza* (2007) 228 CLR 651, 668 [46] (Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ); *Plaintiff S157* (2003) 211 CLR 476, 482-3 [5] (Gleeson CJ), 513-4 [104] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ); See generally, *Plaintiff M61/2010E v The Commonwealth* (2010) 243 CLR 316 [53]-[57] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ) ('*Plaintiff M61*').

<sup>54</sup> *Bodruddaza* (2007) 228 CLR 651, 671 [53] (Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ); *Plaintiff S157* (2003) 211 CLR 476, 482-3 [5] (Gleeson CJ), 513-4 [104] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

<sup>55</sup> *Probuild* (2018) 92 ALJR 248, 265 [72] (Gageler J); *Bank of New South Wales* (1948) 76 CLR 1, 363 (Dixon J).

<sup>56</sup> *Bodruddaza* (2007) 228 CLR 651, 668-9 [44]-[46] (Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ).

<sup>57</sup> (1803) 5 US 137.

province and duty of the judicial department to say what the law is.’<sup>58</sup> This has been met with resounding support in Australian jurisprudence.<sup>59</sup> The separation of judicial power plays a central role in preserving individuals from arbitrary government action.<sup>60</sup> The emphasis on the judiciary as the arbiter of the content of the law is a crucial component of administrative accountability. Parliament cannot confer on a non-judicial body the power to conclusively determine the limits of its own jurisdiction.<sup>61</sup> If legislative restrictions on judicial review were given an operation that reflected their literal meaning the practical effect would be to enable a tribunal or officer to determine the limits of their power for themselves.<sup>62</sup> The High Court has said that if a clause has the practical effect of enabling an administrative decision maker to determine the limits of its own jurisdiction it will intrude upon the place and purpose of s 75(v).<sup>63</sup>

The jurisdiction to issue the writs under s 75(v) is enlivened in circumstances where a decision is affected by jurisdictional error.<sup>64</sup> A decision maker will fall into jurisdictional error where they make a decision that they had no authority to make.<sup>65</sup> Jurisdictional error marks the boundary between validity and invalidity;<sup>66</sup> it marks the boundary of a decision maker’s lawful authority. The centrality of jurisdictional error to the inquiry and its constitutional status is a defining feature of Australian Administrative law.<sup>67</sup>

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<sup>58</sup> Ibid 173 (Marshall CJ); *Communist Party of Australia v The Commonwealth* (1951) 83 CLR 1, 262-3 (Fullagar J); Marshall CJ’s statement has been accepted as a principle that is “axiomatic” in Australian law.

<sup>59</sup> *State of New South Wales v Kable* (2013) 252 CLR 118, 137-8 [50] (French CJ, Hayne, Crennan, Bell, Kiefel and Keane JJ).

<sup>60</sup> *Street v Queensland Bar Association* (1989) 168 CLR 461, 521 (Deane J); Duncan Kerr and George Williams, ‘Review of executive action and the rule of law under the Australian Constitution’ (2003) 14 *Public Law Review* 219, 227.

<sup>61</sup> *Plaintiff S157* (2003) 211 CLR 476, 513 [104] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ); Kerr and Williams, above n 60, 227.

<sup>62</sup> *Plaintiff S157* (2003) 211 CLR 476, 505-6 [75] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

<sup>63</sup> *Bodruddaza* (2007) 228 CLR 651, 671 [53] (Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ).

<sup>64</sup> *Plaintiff S157* (2003) 211 CLR 476, 506 [76] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ); *Futuris* (2008) 237 CLR 146, 162 (Gummow, Hayne, Heydon and Crennan JJ); *Graham v Minister for Immigration and Border Protection* (2017) 91 ALJR 890, 913 [102] (Edelman J); see also Robert French, ‘Constitutional Review of Executive Decisions: Australia’s US legacy’ (2010) 35 *University of Western Australia Law Review* 35, 45.

<sup>65</sup> *Craig v The State of South Australia* (1995) 184 CLR 163, 179 (Brennan, Deane, Toohey, Gaudron and McHugh JJ) (‘*Craig*’).

<sup>66</sup> Gouliaditis, above n 7, 880.

<sup>67</sup> Daniel Reynolds, ‘The Constitutionalisation of Administrative Law: Navigating the cul-de-sac’ (2013) 74 *Australian Institute of Administrative Law Forum* 73, 75; Steven Gageler, ‘Impact of Migration Law on the Development of Australian Administrative Law’ (2010) 17 *Australian Journal of Administrative Law* 92, 100; James Spigelman, ‘The centrality of Jurisdictional Error’ (2010) 21 *Federal Law Review* 77, 84.

Jurisdiction refers to the ‘authority to decide’.<sup>68</sup> Jurisdictional error arises where a decision maker makes a decision outside of the authority conferred upon them by statute.<sup>69</sup> It defines the limits of the authority of officers exercising public power.<sup>70</sup> Despite what would appear to be a reasonably clear definition, jurisdictional error can be an elusive concept.<sup>71</sup> It is the conclusion to the inquiry of whether a ground of judicial review has been successfully proved, rather than the starting point of the inquiry.<sup>72</sup> Mark Aronson, in acknowledging this particular characteristic, described jurisdictional error as being a means of pronouncing on the legality of a decision rather than any test for legality.<sup>73</sup>

In *Craig v The State of South Australia*,<sup>74</sup> the High Court described jurisdictional error as arising if a ground of review is made out; thus if:<sup>75</sup>

[An administrative tribunal] falls into an error of law which causes it to identify a wrong issue, to ask itself a wrong question, to ignore relevant material, to rely on irrelevant material or, at least in some circumstances, to make an erroneous finding or to reach a mistaken conclusion, and the tribunal’s exercise or purported exercise of power is thereby affected, it exceeds its authority or powers. Such an error of law is a jurisdictional error which will invalidate any order or decision of the tribunal which reflects it.

Where a decision maker falls into an error of this kind, the decision will be affected by jurisdictional error.<sup>76</sup> Decisions affected by jurisdictional error are unauthorized by law, they are taken outside the

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<sup>68</sup> Mark Leeming, ‘The riddle of jurisdictional error’ (2014) 38 *Australian Bar Review* 139, 140.

<sup>69</sup> *Aala* (2000) 204 CLR 82, 141 (Hayne J).

<sup>70</sup> Mark Leeming, *Authority to Decide: The law of jurisdiction in Australia* (The Federation Press, 1<sup>st</sup> ed, 2012, Sydney) 46.

<sup>71</sup> *Bros Bins Systems Pty Ltd v Industrial Relations Commission of New South Wales* (2008) 74 NSWLR 257 [36] (Spigelman CJ) citing *City of Yonkers v United States* (1944) 320 US 685, 695 in which Frankfurter J referred to the use of the word ‘jurisdiction’ as one of the most deceptive legal pitfalls.

<sup>72</sup> Matthew Alderton, ‘When jurisdictional errors are not remedied: refusal of constitutional relief on discretionary grounds’ (2015) 23(1) *Australian Journal of Administrative Law* 15, 20; Leeming, above n 70, 48; *SDAV v Minister for Immigration & Multicultural affairs* (2003) 199 ALR 43; [2003] FCAFC129, [27] (Hill, Branson and Stone JJ).

<sup>73</sup> Mark Aronson, ‘Jurisdictional Error without the Tears’ in Matthew Groves and H P Lee (eds), *Australian Administrative Law: Fundamentals, Principles and Doctrines* (2007) 333; see also James Spigelman, ‘Public Law and the Executive’ (2010) 34 *Australian Bar Review* 10, 16; Aronson, Dyer and Groves, above n 15, 14.

<sup>74</sup> (1995) 184 CLR 163.

<sup>75</sup> *Craig* (1995) 184 CLR 163, 179 (Brennan, Deane, Toohey, Gaudron and McHugh JJ); see also Aronson, Dyer and Groves, above n 15, 17-18.

<sup>76</sup> *Ibid.* It should be noted that the grounds listed are examples and not a definitive list of the errors that will give rise to jurisdictional error.



decision maker's power. For this reason, they are not considered to be decisions at all.<sup>77</sup> The list of grounds giving rise to jurisdictional error is not closed.<sup>78</sup>

By delineating the boundary between validity and invalidity, jurisdictional error is the status that defines the limits of power. Former Chief Justice of the High Court, Robert French, said:<sup>79</sup>

Ultimately, the question of jurisdictional error is, for all intents and purposes, one of power. The question is, did the decision maker have the power to make the decision or, relevantly to mandamus, did the decision maker wrongfully decline to fulfil his or her duty to make the decision?

The concept of jurisdictional error should be understood in relation to non-jurisdictional error of law. Not all errors of law are jurisdictional.<sup>80</sup> In *Re Refugee Tribunal; Ex parte Aala*,<sup>81</sup> Hayne J remarked that a non-jurisdictional error of law occurs where a decision maker incorrectly decides a question which they were authorised to decide.<sup>82</sup> Decision makers who have authority to decide a question correctly, must also have jurisdiction to decide the question incorrectly. Jurisdiction refers to the authority to decide the question, as long as the answer reflects the question that the decision maker was empowered to resolve the decision maker will not fall into jurisdictional error. A non-jurisdictional error of law occurs where a decision maker incorrectly answers a question that they were empowered to answer. It is worth noting that this distinction is unique to Australian law, other common law jurisdictions have all but eliminated the concept.<sup>83</sup>

Consequently, because of the role of jurisdictional error as the prerequisite to the grant of the constitutional writs, it is ensconced in the jurisprudence of the High Court. The use of the phrase itself, 'jurisdiction error', is an accident of history and has brought with it the difficulties associated with the concept of jurisdiction.<sup>84</sup> Jurisdictional error involves a question of statutory construction and is

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<sup>77</sup> *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597, 614-15 (Gaudron and Gummow JJ).

<sup>78</sup> *Minister for Immigration and Ethnic Affairs v Yusuf* (2001) 206 CLR 323 [80] (McHugh, Gummow and Hayne JJ with Gleeson CJ and Gaudron J agreeing) ('*Yusuf*'); Aronson, Dyer and Groves, above n 15, 8.

<sup>79</sup> Robert French, 'Constitutional Review of Executive Decisions: Australia's US legacy' (2010) 35 *University of Western Australia Law Review* 35, 40.

<sup>80</sup> *Aala* (2000) 204 CLR 82, 141 (Hayne J).

<sup>81</sup> *Ibid.*

<sup>82</sup> *Ibid*; *Probuild* (2018) 92 ALJR 248, 275 [107] (Edelman J).

<sup>83</sup> For England and Wales, see generally *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147, 171 (Lord Reid) ('*Anisminic*').

<sup>84</sup> Jeremy Kirk, 'The concept of jurisdictional error' (paper presented to Constitutional and Administrative Law Section, New South Wales Bar Association, 30 May 2012).

therefore entirely dependent on statutory context.<sup>85</sup> This is the basis for the no-invalidity clause problem.

### 3 *The no-invalidity clause problem*

A no-invalidity clause is a legislative provision that operates to circumvent judicial review by stating that an exercise of statutory power is valid notwithstanding a breach of a particular statutory requirement.<sup>86</sup> The limits of jurisdiction are determined by reference to the intention of parliament through an interpretation of a formally enacted statute.<sup>87</sup> A no-invalidity clause is designed to expand the jurisdiction of a decision maker by bringing errors that would otherwise be jurisdictional, within jurisdiction.<sup>88</sup> There are different types of no-invalidity clause, broad and narrow (conceivably, also anywhere in between). Broad no-invalidity clauses target the validity of decisions taken under an act or a part of an act.<sup>89</sup> On the other hand, narrow no-invalidity clauses target specific legislative requirements.<sup>90</sup>

Section 175 of the Tax Act is an example of a broad no-invalidity clause and was given in the introductory remarks of this thesis. The declaration in s 175 that an assessment will be valid notwithstanding any breach, includes all requirements under the Tax Act. In comparison, multiple examples of narrow no-invalidity clauses can be found in the *Migration Act 1958* (Cth) (the ‘Migration Act’).<sup>91</sup> For example, s 501G(4) states that the failure to comply with the duty to provide reasons for the decision to cancel a visa does ‘not affect the validity of the decision’ to cancel the visa.<sup>92</sup>

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<sup>85</sup> Leeming, above n 70, 48.

<sup>86</sup> Lisa Burton Crawford, ‘Who decides the validity of executive action? No-invalidity clauses and the separation of powers’ (2017) 24 *Australian Journal of Administrative Law* 81, 81-2.

<sup>87</sup> Jeffery Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates* (Cambridge University Press, 2010) 232.

<sup>88</sup> McDonald, above n 8, 18.

<sup>89</sup> Burton Crawford, above n 86, 83.

<sup>90</sup> *Ibid.*

<sup>91</sup> Mark Aronson has observed that there are at least ‘three dozen’ no-invalidity type provisions in the Migration Act, for discussion, see generally, Mark Aronson, ‘The Growth of Substantive Review: the Changes, their Causes and their Consequences’, in John Bell et al, (eds), *Public Law Adjudication in Common Law Systems: Process and Substance* (Hart Publishing, 2016) Ch 6.

<sup>92</sup> *Migration Act 2001* (Cth) s 501G(4). Other examples of no-invalidity clauses include: *Renewable Energy (Electricity) Act 2000* (Cth) s 53 ‘The validity of an assessment is not affected because any provision of this Act has not been complied with’; *Telecommunications Act 1997* (Cth) s 205 ‘The validity of an assessment is not affected by a contravention of this Act’; *Petroleum Resource Rent Tax Assessment Act 1987* (Cth) s 65 ‘The validity of an assessment is not affected by a failure to comply with this Act’.

There can be good policy reasons for enacting a no-invalidity clause. Legislative restrictions on judicial review are important for establishing certainty and finality.<sup>93</sup> The construction industry provides a particularly cogent example of an area where finality and certainty are valuable. Construction companies are heavily dependent on substantial projects and extensive ongoing litigation can create difficulties for both the projects and the existence of the companies themselves.<sup>94</sup> Where finality and certainty are crucial, restrictions on judicial review are important. As well as this, there is often a need to channel decision making and review into a tribunal of specialist knowledge.<sup>95</sup> For example, in industrial relations an intimate understanding of the subject matter provides a basis for more efficient and effective decision making.<sup>96</sup> No-invalidity clauses, as well as other restrictions on judicial review, facilitate this.

Most importantly, for the purposes of this discussion, no-invalidity clauses are tied directly to the question of validity. Invalidity is the direct consequence of a finding of jurisdictional error.<sup>97</sup> No-invalidity clauses target jurisdiction by attempting to classify non-compliance with statutory requirement(s) as non-jurisdictional. Without a jurisdictional error the constitutional writs are not available to remedy the non-compliance. This is the no-invalidity clause problem. They operate to circumvent the entrenched minimum provision of judicial review by leaving the Court with ‘nothing on which to bite’.<sup>98</sup> In *Futuris*, the High Court gave effect to s 175 of the Tax Act.<sup>99</sup> It was determined, by the majority, that where s 175 applied, errors in the process of assessment<sup>100</sup> did not go to jurisdiction and therefore could not attract a remedy for jurisdictional error.<sup>101</sup> On its face, the Court’s approach appears to be inconsistent with its existing jurisprudence on the entrenched minimum provision of judicial review. The subject matter of this case will be explored in more detail in chapter II.

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<sup>93</sup> *Public Service Association of South Australia v Federated Clerks Union of Australia, South Australia Branch* (1991) 173 CLR 132, 147-8 (Deane J); *Baxter v New South Wales Clickers’ Association* (1909) 10 CLR 114, 161 (Isaacs J).

<sup>94</sup> See generally New South Wales, Legislative Assembly, Parliamentary debates (Hansard), 12 November 2001, 6542: ‘cash flow is the life-blood of the construction industry’; *Probuild* (2018) 92 ALJR 248, 260 (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

<sup>95</sup> Gouliaditis, above n 7, 880.

<sup>96</sup> *Kirk* (2010) 239 CLR 531, 581 [99] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

<sup>97</sup> As discussed above in Part B.2 of this chapter, a decision affected by jurisdictional error is ‘no decision at all’ and, therefore, the consequence of establishing jurisdictional error is invalidity.

<sup>98</sup> Enid Campbell and Matthew Groves, ‘Privative Clauses and the Australian Constitution’ (2004) 4 *Oxford University Commonwealth Law Journal* 51, 69 cited in Noonan, above n 8, 459.

<sup>99</sup> *Futuris* (2008) 37 CLR 146; although it should be noted that the High Court gave broad but not *full effect* to s 175’s terms, this is important and is explored in detail in Chapter II, Part C.3.

<sup>100</sup> The process of assessment refers to the process of assessing tax liability. The requirements are outlined in the *Income Tax Assessment Act 1939* (Cth). The errors referred to relate to errors in the process of assessing a taxpayer’s tax liability.

<sup>101</sup> *Futuris* (2008) 37 CLR 146, 157 (Gummow, Hayne, Heydon and Crennan JJ).

## II. THE JUDICIAL RESPONSE TO PRIVATIVE AND NO-INVALIDITY CLAUSES

### A Introduction

For as long as the courts have exercised their supervisory jurisdiction the legislature has tried to curb or remove it. Statutory restrictions on judicial review have taken a number of forms.<sup>102</sup> The most common and well-known approach is through the use of a privative clause.<sup>103</sup> The case law on privative clauses has dealt with the purview of s 75(v) and can offer insight into the entrenched minimum provision of judicial review. This chapter will first examine the judicial response to privative clauses. An understanding of the treatment of privative clauses is important for developing an understanding of the High Court's approach to no-invalidity clauses. The Court has made important remarks in privative clause cases about how the s 75(v) jurisdiction operates.

No-invalidity clauses have been considered in a number of High Court decisions. This thesis will consider some key cases that illustrate the High Court's approach. In both *Futuris* and *Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Palme* ('*Palme*'),<sup>104</sup> the Court gave effect to each no-invalidity clause, allowing them to operate effectively to oust judicial review. This came as a shift from the 1995 case of *Deputy Commissioner of Taxation v Richard Walter* ('*Richard Walter*'),<sup>105</sup> where the Court's treatment of the no-invalidity clause had been similar to its treatment of privative clauses. This chapter will outline the judicial approach to privative clauses by discussing some major cases. It will then explore the High Court's consideration of no-invalidity clauses.

### B Privative Clauses

Privative clauses are clauses that deprive, or purport to deprive, the courts of jurisdiction to review the acts of public officials, tribunals or courts.<sup>106</sup> A privative clause can purport to exclude judicial review completely, or in part and can take a number of forms. For example, a clause that stipulates that an administrative decision is final, a clause that bars the issue of particular administrative law remedies, a

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<sup>102</sup> For a list and discussion of the common ways in which parliament can restrict access to judicial review, see generally, Aronson, Dyer and Groves, above n 15, 943-4; The Administrative Review Council's Discussion Paper, *The Scope of Judicial Review*, 2003, 16.

<sup>103</sup> Bateman, above n 6, 463.

<sup>104</sup> (2003) 216 CLR 212.

<sup>105</sup> (1995) 183 CLR 168.

<sup>106</sup> Gouliaditis, above n 7, 870.

clause that limits the grounds upon which judicial review is available, or provides time limits within which aggrieved persons must seek judicial review.<sup>107</sup>

An extensive, or complete, privative clause will exclude the decisions taken under the act from review and outline remedies that the court is unable to issue. The paramount example of the complete privative clause is s 474 of the Migration Act.<sup>108</sup>

(1) A privative clause decision.<sup>109</sup>

- (a) is final and conclusive; and
- (b) must not be challenged, appealed against, reviewed, quashed, or called into question in any court; and
- (c) not subject to prohibition, mandamus, injunction, declaration or certiorari in any court on any account.

Provisions of this kind are common, particularly in areas of law that are more politically charged. For example, industrial relations legislation<sup>110</sup> and in the Migration Act.<sup>111</sup> They reflect government attempts to control the outcome of administrative decisions related to politically sensitive subject matter. As a result, litigation in these areas has massively influenced the development of Administrative law in Australia.

Understandably, however, the courts are resistant to the prospect of administrative decisions being excluded from review.<sup>112</sup> A central aspect of the rule of law, as observed by A V Dicey, is that every person is equally subject to the law, even government.<sup>113</sup> The rule of law is an assumption upon which the *Constitution* is premised.<sup>114</sup> If privative clauses were given their literal meaning they would

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<sup>107</sup> The Administrative Review Council's Discussion Paper, *The Scope of Judicial Review*, 2003, 157-164; Creyke and McMillan, above n 5, 869; see generally, Aronson, Dyer and Groves, above n 15, ch 17.

<sup>108</sup> *Migration Act 1958* (Cth) s 474(1).

<sup>109</sup> A 'privative clause' decision is defined in section 474(2) of the *Migration Act 1958* (Cth) as including any decision that is listed in that section (the section includes an extensive list) and includes a short table of decisions that are not considered *privative clause decisions*.

<sup>110</sup> See, eg, Reg 17 of the *National Security (Coal Mining Industry Employment) Regulations 1941* (Cth) and s 179 of the *Industrial Relations Act 1996* (NSW).

<sup>111</sup> For a discussion of the impact of Migration law on the development of Administrative law in Australia see generally, Stephen Gageler, 'Impact of Migration Law on the Development of Australian Administrative Law' (2010) 17 *Australian Journal of Administrative Law* 92.

<sup>112</sup> *Svecova v Industrial Commission of New South Wales* (1991) 39 IR 328, 330 (Kirby P); William, Wade, *Constitutional Fundamentals* (Stephen & Sons, 1988) 66.

<sup>113</sup> A V Dicey, *An Introduction to the Study of the Law of the Constitution* (MacMillan, 10<sup>th</sup> ed, 1959) 193; Augusto Zimmerman, *Western Legal Theory: History, Concepts and Perspectives* (LexisNexis Butterworths, NSW, 1<sup>st</sup> ed, 2013) 84.

<sup>114</sup> *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1, 193 (Dixon J); *Plaintiff S157* (2003) 211 CLR 476, 492 [31] (Gleeson CJ), 513 [103] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

contravene s 75(v).<sup>115</sup> The grant of limited jurisdiction coupled with the removal of any supervision and maintenance of that jurisdiction, gives rise to a prima facie inconsistency.<sup>116</sup> This inconsistency began receiving recognition when it was observed by Griffith CJ in the early 20<sup>th</sup> century.<sup>117</sup> This rationale, coupled with the presumption of legality, which will be discussed in more detail in Chapter V, has substantially informed the judiciary's approach to privative clauses.<sup>118</sup> The balancing act of giving effect to the intention of parliament and preserving these fundamental principles is a difficult task. The Court also presumes that parliament intended to enact legislation consistent with the *Constitution*.<sup>119</sup> The outcome is that privative clauses have been read narrowly, as preserving decisions from review only where the decision is not subject to jurisdictional error.<sup>120</sup>

Even before Federation, for more than a century, the legislature made use of clauses that purported to oust the jurisdiction of courts to hear applications for the prerogative writs.<sup>121</sup> Prior to federation, privative clauses were somewhat effective at controlling the exercise of supervisory jurisdiction. Courts always retained their supervisory jurisdiction but its manner of exercise was controlled and limited by the privative clause.<sup>122</sup> The boundaries, beyond which privative clauses were deemed to be ineffective, were circumstances of significant error. These were described as decisions affected by 'manifest defect of jurisdiction in the tribunal that made it, or of manifest fraud in the party procuring it.'<sup>123</sup> As an example of manifest defect of jurisdiction, a tribunal established to determine whether mining companies are financially viable, and if not to appoint receivers, has no jurisdiction to appoint receivers to a company involved in the production of automobiles for consumers.<sup>124</sup> If such a tribunal did so, it

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<sup>115</sup> *Graham* (2017) 91 ALJR 890, 902 (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).

<sup>116</sup> *R v Hickman; Ex parte Fox* (1945) 70 CLR 598, 616 (Dixon J) ('*Hickman*'); *Plaintiff S157* (2003) 211 CLR 476, 486 [17] (Gleeson CJ), 501 [61] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ); *Coldham* (1983) 153 CLR 415, 418 (Mason ACJ and Brennan J).

<sup>117</sup> *Clancy v Butchers' Shop Employees Union* (1904) 1 CLR 181, 197 (Griffith CJ) ('*Clancy*'); see also *Baxter v New South Wales Clicker's Association* (1909) 10 CLR 114, 128 (Griffith CJ), 139-40 (Barton J).

<sup>118</sup> *Probuild* (2018) 92 ALJR 248, 270 [87] (Edelman J) citing *Electrolux Home Products Pty Ltd v Australian Worker's Union* (2004) 221 CLR 309, 329 [21] (Gleeson CJ); *Plaintiff S157* (2003) 211 CLR 476, 492-3 [32]-[33] (Gleeson CJ), 504-5 [71]-[72] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

<sup>119</sup> *Plaintiff S157* (2003) 211 CLR 476, 506 [76] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

<sup>120</sup> *Ibid*; *Futuris* (2008) 237 CLR 146, 162 (Gummow, Hayne, Heydon and Crennan JJ); *Graham* (2017) 91 ALJR 890, 913 [102] (Edelman J); *Darlington Casino Ltd v New South Wales Casino Control Authority* (1997) 191 CLR 602, 635 (Gaudron and Gummow JJ).

<sup>121</sup> see, eg *R v Jukes* (1800) 8 TR 542; *R v Moreley* (1760) 2 Burr. 1040; *R v Plowright* (1685) 3 Mod. 94.

<sup>122</sup> *The Colonial Bank of Australasia v Robert Willan (Victoria)* [1874] UKPC 28, 32 (Colville, Peacock, Smith and Collier LJ) ('*Willan*').

<sup>123</sup> *Ibid*.

<sup>124</sup> This example is taken partially from the case in *Willan*, where the Judge of the Court of Mines made a decision to impose a winding up order on a company that was outside the Court of Mines' jurisdiction.

would fall into jurisdictional error and a privative clause, on its proper construction, would not preserve the decision from review.

Privative clauses have, in this way, always been narrowly construed and given a meaning slightly different from what the literal words convey. This has been the case even without constitutional considerations pre-Federation.<sup>125</sup> After Federation, the general position that privative clauses were ineffective to oust the court's power to issue the (now 'constitutional') writs continued, finding support in s 75(v).<sup>126</sup> Federal and State privative clauses continued to be ineffective in ousting judicial review for significant error of jurisdiction.<sup>127</sup> In *Clancy v Butchers' Shop Employees Union*,<sup>128</sup> Griffith CJ noted that the rationale for restricting the effect of privative clauses was to resolve an inconsistency within the legislation.<sup>129</sup> If not, to remove supervision of inferior courts and administrative tribunals would be to effectively give them an unlimited jurisdiction.<sup>130</sup> Similar observations were made in *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Whybrow*.<sup>131</sup> Privative clauses were understood on the basis that they could only preclude review for minor/non-jurisdictional errors of law.<sup>132</sup>

# 1      *R v Hickman; Ex parte Fox*

Justice Dixon, in *R v Hickman; Ex parte Fox* ('*Hickman*'),<sup>133</sup> sought to clarify how privative clauses were to be approached. If Parliament grants a decision maker limited jurisdiction, only to then declare that decisions of that decision maker are unreviewable, the limited grant of jurisdiction is unenforceable. Justice Dixon set about to clarify this contradiction. The High Court was required to decide whether the writ of prohibition was available notwithstanding a privative clause. The privative clause was Reg 17 of the *National Security (Coal Mining Industry Employment) Regulations*. Regulation 17 stated that a

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<sup>125</sup> *Probuild* (2018) 92 ALJR 248, 269 [85] (Edelman J); *Plaintiff S157* (2003) 211 CLR 476, 484-5 [12] (Gleeson CJ) citing *Willan* [1874] UKPC 28, 32; see also *Anisminic* [1969] 2 AC 147.

<sup>126</sup> *R v Commonwealth Court of Conciliation and Arbitration; ex parte Whybrow* (1910) 11 CLR 1 ('*Whybrow*'); *The Tramways Case [No 1]* (1914) 18 CLR 54; see also *Australian Coal and Shale Employees Federation v Aberfeld Coal Mining Co Ltd* (1942) 66 CLR 161.

<sup>127</sup> *Clancy* (1904) 1 CLR 181, 196-7 (Griffith CJ), 203-4 (Barton J), 204-5 (O'Connor J); see also, *Whybrow* (1910) 11 CLR 1.

<sup>128</sup> (1904) 1 CLR 181.

<sup>129</sup> *Ibid* 197 (Griffith CJ).

<sup>130</sup> *Ibid*.

<sup>131</sup> *Whybrow* (1910) 11 CLR 1, 22 (Griffith CJ), 33 (Barton J), 40-41 (O'Connor J).

<sup>132</sup> Gouliaditis, above n 7, 883.

<sup>133</sup> (1945) 70 CLR 598.

decision of a local reference board (the 'Reference Board') 'shall not be challenged, appealed against, quashed, or called into question, or be subject to mandamus, prohibition or certiorari.'<sup>134</sup>

The Reference Board had made a determination that particular haulage contractors were employees of the coal mining industry and therefore were entitled to be remunerated under the Mechanics (Coal Mining Industry) Award.<sup>135</sup> The jurisdiction of the Reference Board only extended to settling disputes between employers and employees of the coal mining industry. The contractors' employers sought a writ of prohibition to prevent the decision from being proceeded upon. Despite the existence of Reg 17, the High Court issued the writ. It did so on the ground that the privative clause could only extend to decisions affecting 'employees of the coal mining industry,' which the contractors were not.<sup>136</sup> The Reference Board had no jurisdiction to make the determination and had fallen into jurisdictional error.

Justice Dixon considered, and rejected, an argument that Reg 17 precluded relief entirely. His Honour explained that privative clauses were never intended to actually remove the supervisory jurisdiction of the High Court. Rather, they were intended to mean that no decision taken by the decision making body was to be invalidated on the basis that certain requirements, laid out in the legislation empowering the decision maker, had not been adhered to.<sup>137</sup> The privative clause was never intended to displace the High Court's jurisdiction under s 75(v). Indeed, it could never do so. On this point, Dixon J said the following:<sup>138</sup>

[Privative clauses] are not to be interpreted as meaning to set at large the courts or other judicial bodies to whose decision they relate. Such a clause is interpreted as meaning that no decision which is in fact given by the body concerned shall be invalidated on the ground that it has not conformed to the requirements governing its proceedings or the exercise of its authority or has not confined its acts within the limits laid down by the instrument giving it authority...

Following on from this observation, Dixon J established a set of criteria that, if satisfied, insulated the decision from review without contravening s 75(v). The requirements outlined by Dixon J consisted of, first, that the decision taken was bona fide, second, that the decision relates to the subject matter of the legislation and, third, that the decision is reasonably capable of reference to the power given to the body.<sup>139</sup>

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<sup>134</sup> *National Security (Coal Mining Industry Employment) Regulations 1941* (Cth) r 17.

<sup>135</sup> *Hickman* (1945) 70 CLR 598, 599.

<sup>136</sup> Ibid 609 (Latham CJ), 610 (Rich J), 612 (Starke J), 614-16 (Dixon J), 621 (McTiernan J).

<sup>137</sup> Ibid 614 (Dixon J).

<sup>138</sup> Ibid.

<sup>139</sup> Ibid.



Justice Dixon's approach hinged on the need to reconcile the provisions in light of an interpretation of the whole legislative instrument.<sup>140</sup> In this way, parliamentary intention could be supported and an interpretation consistent with s 75(v) was recognisable. The satisfaction of these requirements reconciled the prima facie inconsistency first observed by Griffith CJ in *Clancy*.<sup>141</sup> The approach was taken up subsequently by the High Court and State Supreme Courts.<sup>142</sup> Justice Dixon's 'Hickman Provisos' became entrenched as the authoritative principle underlying the interpretation of privative clauses.<sup>143</sup> However, despite being widely adopted, the Hickman Provisos have been subject to criticism associated with their significant complexity, artificiality and difficulty in application.<sup>144</sup>

## 2 *Plaintiff S157/2002 v The Commonwealth*

*Plaintiff S157* is the High Court's seminal case on the interpretation of privative clauses. The High Court engaged in a thorough discussion of the principles applicable to the interpretation of privative clauses, taking advantage of an opportunity to put the Hickman Provisos into 'perspective'.<sup>145</sup> The Plaintiff applied for writs of prohibition and mandamus, and certiorari as ancillary relief, with respect to a decision of the Refugee Review Tribunal ('the Tribunal') to refuse the granting of a Protection Visa.<sup>146</sup> The High Court had to consider the effect of s 474 of the Migration Act which purported, if given a literal interpretation, to exclude the High Court's jurisdiction under s 75(v).<sup>147</sup> Section 474 was provided above as an example of the 'complete' privative clause.<sup>148</sup>

The application was made on the ground of denial of procedural fairness. The allegation was that the Tribunal took information into account that, although relevant, the Plaintiff had no opportunity to

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<sup>140</sup>Ibid 616 (Dixon J).

<sup>141</sup> *Coldham* (1983) 153 CLR 415, 418 (Mason ACJ and Brennan J); Stuart Brady, 'Privative Clauses: A universal approach and its underpinnings' (2008) 56 *Australian Institute of Administrative Law Forum* 48, 50.

<sup>142</sup> *Plaintiff S157* (2003) 211 CLR 476, 485 [14] (Gleeson CJ).

<sup>143</sup> Ibid 489 [22] (Gleeson CJ); see generally, *Richard Walter* (1995) 183 CLR 168; *Darlington Casino Ltd v New South Wales Casino Control Authority* (1997) 191 CLR 602; *Coal Miner's Industrial Union of Western Australia v Amalgamated Collieries of Western Australia Ltd* (1960) 104 CLR 437.

<sup>144</sup> *Futuris* (2008) 237 CLR 146, 167 [68] (Gummow, Hayne, Heydon and Crennan JJ): the majority described Dixon J's method of interpretation as 'torturous'; see also Duncan Kerr, 'Privative Clauses and the Courts: Why and How Australian Courts have Resisted Attempts to Remove a Citizen's Right to Judicial Review of Unlawful Executive Action' (2005) 5 (2) *Queensland University of Technology* 195, 205; Sir Anthony Mason, 'The analytical Foundations, Scope and Comparative Analysis of the Judicial Review of Administrative Action' in Geoffrey Lindell (ed), *The Mason Papers* (Federation Press, 2007) 180, 188; Pat Keane, 'Judicial Power and the Limits of Judicial Control' in Peter Cane (ed), *Centenary Essays for the High Court of Australia* (LexisNexis, 2004) 295, 310. For a defence of Dixon J's formulation, see generally Jacob Waller, 'Gone but not Forgotten: In Defence of Hickman' (2018) 46 *Federal Law Review* 259.

<sup>145</sup> *Futuris* (2008) 237 CLR 146, 168 [70] (Gummow, Hayne, Heydon and Crennan JJ).

<sup>146</sup> For the criteria for the granting of a Protection Visa generally, see *Migration Act 1958* (Cth) s 36.

<sup>147</sup> *Plaintiff S157* (2003) 211 CLR 476, 505-6 [75] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

<sup>148</sup> See Chapter I, discussion on page 26.

respond to. Section 474 of the Migration Act presented an obstacle to judicial review under s 75(v) and the Court was forced to consider whether it precluded relief. Ultimately, the Court found s 474 was inadequate to prevent review for denial of procedural fairness.<sup>149</sup> In the context of the legislation as a whole, procedural fairness was considered to be a crucial component of the Tribunal's decision. Failure to provide the Plaintiff with an opportunity to respond to the information constituted a jurisdictional error. This was the case despite the fact that there had been no suggestion that the Tribunal had not acted bona fide in its assessment, and that both other Hickman Provisos were satisfied.<sup>150</sup>

The High Court concluded that s 75(v) entrenched a minimum provision of judicial review, as discussed above.<sup>151</sup> The privative clause was not declared to be invalid, however, it could only operate in respect of non-jurisdictional errors of law.<sup>152</sup> It remained beyond the power of the legislature to prevent judicial review of jurisdictional error. In this way, jurisdictional error was centralised as the main focus of the inquiry. The joint-judgment made the following observation:<sup>153</sup>

[A] privative clause cannot protect against a failure to make a decision required by the legislation in which that clause is found or against a decision which... exceeds jurisdiction.

The process of statutory interpretation that applies is an inquiry about jurisdiction and, therefore, statutory interpretation. There were 'inviolable limitations' which could never attract the protection of the privative clause.<sup>154</sup> This moved the emphasis away from the reconciliation process advanced by Dixon J.

However, the Hickman Provisos still have a significant role to play, as Gleeson CJ observed, they are heavily entrenched in the jurisprudence of the Court.<sup>155</sup> His Honour observed that the Hickman provisos can only form part of the assessment.<sup>156</sup> A decision taken under the Migration Act to grant or refuse a visa would always relate to the subject matter of the legislation and be reasonably capable of reference to the power. Chief Justice Gleeson astutely pointed out, however, that it could not be said that the intention of the parliament was such that decisions that were unfair, but taken bona fide, were to be

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<sup>149</sup> *Plaintiff S157* (2003) 211 CLR 476, 496 [45] (Gleeson CJ), 514 [106] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ), 538 [177] (Calinan J).

<sup>150</sup> *Ibid*.

<sup>151</sup> See Chapter I, Part 1: *The entrenched minimum provision of judicial review*.

<sup>152</sup> *Plaintiff S157* (2003) 211 CLR 476, 506 [76] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

<sup>153</sup> *Ibid* 500 [57] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

<sup>154</sup> *Ibid* 489 [21], 493 [33] (Gleeson CJ), 503 [66] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ) citing *R v Murray; Ex parte Proctor* (1949) 77 CLR 387, 399-400 (Dixon J).

<sup>155</sup> *Ibid* 489 [22] (Gleeson CJ); 501-3 [61]-[66] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

<sup>156</sup> *Ibid* 493 [33] (Gleeson CJ); 502-3 [64]-[66] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

preserved from review because such human rights were at stake.<sup>157</sup> If it was the intention of the legislature, it was not made sufficiently clear.<sup>158</sup>

Importantly, whether the breach attracted the protection of the privative clause by meeting the Hickman Provisos was only part of a larger question of statutory construction.<sup>159</sup> The assessment of whether a jurisdictional error arose in the circumstances depended upon an interpretative exercise involving all relevant principles of statutory construction.<sup>160</sup> The privative clause does not operate to expand the jurisdiction of the decision maker, it is only part of the broader process of statutory construction.<sup>161</sup> What can be seen from this reasoning is that the privative clause is, essentially, gutted.<sup>162</sup> The clause is left with virtually nothing to do. It protects against the review of non-jurisdictional errors of law, but whether errors of law are jurisdictional or not depends on the application of all relevant principles of construction. Accordingly, the Hickman Provisos form only part of the broader process of statutory construction. No-invalidity clauses pose a slightly different question, but require similar considerations.

### C *No-invalidity Clauses*

No-invalidity clauses pose a unique problem. The consequence of a decision maker falling into jurisdictional error is that the decision is invalid, but a no-invalidity clause purports to prevent that outcome. This raises questions about how they should be approached in light of s 75(v). In the Tax Act case of *Richard Walter*, a majority of the High Court identified an apparent prima facie inconsistency, of the kind identified in *Hickman*, between the no-invalidity clause in s 175 and the broader Tax Act. The *Hickman* approach was applied to resolve that inconsistency. However, subsequent cases have taken an alternative approach. In both *Palme*, a Migration Act case, and *Futuris*, another Tax Act case, the High Court did not consider that any prima facie inconsistency arose between a no-invalidity clause and the other provisions in the Tax Act. Therefore, no reconciliation process was required to make the provisions compatible. In both *Palme* and *Futuris* the majority concluded that the question to be asked was actually the question posed in *Project Blue Sky v Australian Broadcasting Association* ('*Project Blue Sky*').<sup>163</sup>

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<sup>157</sup> Ibid 494 [37] (Gleeson CJ), 514 [106] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ), 538 [177] (Calinan J).

<sup>158</sup> Ibid.

<sup>159</sup> Ibid 493 [33] (Gleeson CJ); 502-3 [64]-[66] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

<sup>160</sup> Ibid 489 [24] (Gleeson CJ); 503 [61]-[66], [71]-[72] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

<sup>161</sup> Ibid 502 [64] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

<sup>162</sup> Gouliaditis, above n 7, 874.

<sup>163</sup> (1998) 194 CLR 355.

The *Project Blue Sky* test for whether a decision, taken in breach of particular legislative requirements, is invalid, is to be resolved based upon the construction of the legislation as a whole. The essential question is to ask whether it was a ‘purpose’ of the legislation that an act done or not done, in breach of a legislative requirement, should render the decision invalid.<sup>164</sup> In determining the question of purpose, regard must be had to the language of the relevant provision and the scope and object of the statute as a whole.<sup>165</sup> The *Project Blue Sky* test for validity is preferred where no process of reconciliation is necessary. Consideration of the above key authorities on no-invalidity clauses will begin with the case of *Richard Walter*.

# 1 *Deputy Commissioner of Taxation v Richard Walter*

In the case of *Richard Walter*, the High Court dealt with the broad no-invalidity clause under s 175 of the Tax Act. At the time this case was heard, there had been a number of earlier cases dealing with s 175, its place in the Tax Act, and its effectiveness at precluding judicial review.<sup>166</sup> *Richard Walter* consolidated the pre-existing jurisprudence, and the approach adopted was to consider s 175 as a privative type provision. Richard Walter Pty Ltd sought judicial review of the Deputy Commissioner’s assessment of their tax liability for the years ending 30 June 1981, 1982, 1983 and 1984. This assessment included a much higher tax liability than Richard Walter Pty Ltd had anticipated because it included the tax liability of a related entity. The Commissioner had applied anti-avoidance provisions under Part IVA of the Tax Act.<sup>167</sup> The Part IVA provisions apply as part of the assessment of the taxpayer’s overall tax liability.<sup>168</sup>

Richard Walter Pty Ltd alleged that double counting had occurred and that the Commissioner had not acted bona fide in the making of the assessment. Judicial review of the decision was sought in the Federal Court and the effect of s 175 of the Tax Act had to be considered. The case was removed into the High Court to consider the question. The Court found that s 175 did not preclude wholly, or in part, judicial review of an assessment taken under the Tax Act.<sup>169</sup> The application for review did, however, fail in the circumstances of the case because the assessment had been made bona fide.

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<sup>164</sup> *Project Blue Sky* (1998) 194 CLR 355, 390-1 [93] (McHugh, Gummow, Kirby and Hayne JJ); see also *Futuris* (2008) 237 CLR 146, 156-7 [23]-[24] (Gummow, Hayne, Heydon and Crennan JJ); *Re Minister for Immigration and Multicultural Affairs; Ex parte Palme* (2003) 216 CLR 212, 227 [33] (McHugh).

<sup>165</sup> *Ibid*.

<sup>166</sup> See, eg, *F J Bloeman Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 360; *David Jones Finance & Investments Pty Ltd v Federal Commissioner of Taxation* (1991) 28 FCR 484.

<sup>167</sup> The provisions under Part IVA – ‘Schemes to reduce income tax’ are designed to attach tax liability to particular schemes set up to avoid the payment of income tax.

<sup>168</sup> *Richard Walter* (1995) 183 CLR 168, 178 (Mason CJ).

<sup>169</sup> *Ibid* 180 (Mason CJ).

An explanation of ss 175 and 177(1) of the Tax Act is useful here, because it also applies to the decision in *Futuris*. Section 175 is the no-invalidity clause, it was given as an example above but has been reproduced here to assist the reader:<sup>170</sup>

The validity of any assessment shall not be affected by reason that any of the provisions of this act have not been complied with.

Section 177(1) provided for the production of a ‘Notice of Assessment’. Under s 177(1) that notice was to be considered conclusive evidence of the due making of an assessment and that the particulars of the assessment were correct.<sup>171</sup> However, s 177(1) did not apply to proceedings taken under Part IVC of the *Taxation Administration Act 1953* (Cth) (‘the Tax Admin Act’).<sup>172</sup> Part IVC of the Tax Admin Act involved appeals processes that could be instigated under s 175A of the Tax Act.

Discussion of the effect of ss 175 and 177(1) of the Tax Act, and their potential interaction with s 75(v) of the *Constitution* was necessary in *Richard Walter*, because of the protection from review that ss 175 and 177(1) purported to afford. Chief Justice Mason treated the operation of ss 175 and 177(1) collectively as privative type clauses. His Honour relied upon Dixon J’s discussion in *Hickman*. Where limitations are conferred upon a decision maker, and there is a clause preventing the enforcement of those limitations, it becomes a question of interpreting the legislation as a whole to ascertain whether transgression of the limitations results in invalidity.<sup>173</sup> In *R v Coldham; Ex parte Australian Worker’s Union*,<sup>174</sup> Mason CJ and Brennan J had stated that this approach was necessary where there was a need to reconcile an internal inconsistency.<sup>175</sup> In *Richard Walter*, Chief Justice Mason concluded that ss 175 and 177(1) presented such an inconsistency, and operated in the same manner as a privative clause.<sup>176</sup> However, his Honour went on to observe that the operation of s 177(1) was on the substantive law as an evidentiary provision.<sup>177</sup> Specifically, s 177(1) gave effect to s 175 which operated to preserve the validity of decisions of the Commissioner outside of the review proceedings under the Tax Admin Act.<sup>178</sup> Construed in this manner, ss 177(1) and 175 operated such that there was no inconsistency with

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<sup>170</sup> *Income Tax Assessment Act 1939* (Cth) s 175.

<sup>171</sup> *Ibid* s 177(1) (repealed).

<sup>172</sup> *Taxation Administration Act 1953* (Cth) Part IVC: ‘Taxation objections, reviews and appeals’.

<sup>173</sup> *Richard Walter Pty Ltd* (1995) 183 CLR 168, 180 (Mason CJ) citing *Hickman* (1945) 70 CLR 598, 616 (Dixon J).

<sup>174</sup> (1983) 153 CLR 415.

<sup>175</sup> *Ibid* 418 (Mason ACJ and Brennan J) cited in *Richard Walter* (1995) 183 CLR 168, 179-80 (Mason CJ) cited in *Richard Walter* (1995) 183 CLR 168, 179-80 (Mason CJ).

<sup>176</sup> In forming this conclusion, Mason CJ drew an analogy between ss 175 and 177(1), and s 60 of the *Conciliation and Arbitration Act 1904* (Cth), which purported to protect an award from challenge on the ground of a mere defect or irregularity.<sup>176</sup>

<sup>177</sup> *Richard Walter* (1995) 183 CLR 168, 184 (Mason CJ).

<sup>178</sup> *Ibid* 188 (Mason CJ).

s 75(v).<sup>179</sup> The combined operation of the sections could preclude review if decisions were taken consistently with the Hickman Provisos.<sup>180</sup>

Justice Brennan specifically addressed s 175, and similarly concluded that it operated like a privative clause. His Honour stated:<sup>181</sup>

When the general provisions of a statute prima facie condition the valid exercise of a power and are found together with another provision which confers validity on a purported exercise of the power despite a failure to comply with the general provisions, the problem of reconciling the general provisions and the validating provision is indistinguishable from that which arises when a privative clause withdraws jurisdiction to review.

This approach was also applied to s 175 by Deane and Gaudron JJ.<sup>182</sup> However, both Dawson and Toohey JJ could see no internal inconsistency arising between s 175 and the requirements imposed under the Tax Act.<sup>183</sup> Their Honours concurred on the point that s 175 had no operation where no valid assessment had been made and that s 177(1) purported to exclude evidence of any claim, other than for review the Tax Admin Act.<sup>184</sup> Accordingly, their Honours saw no place for the application of the Hickman Provisos, a view which the High Court adopted as the correct one in *Palme*.

## 2 *Re Minister for Immigration & Multicultural & Indigenous Affairs; Ex parte Palme*

This case dealt with a narrow no-invalidity clause. Under the character cancellation provisions in the Migration Act there is a requirement to give reasons.<sup>185</sup> Section 501G, the section requiring the Minister to give reasons, also contains a provision that purports to prevent the invalidity of a decision to cancel a visa on character grounds when the decision maker fails to provide reasons as required by s 501G.<sup>186</sup> The Plaintiff in this case was a German national who had lived in Australia since 1971 and was subject to a visa cancellation under s 501 of the Migration Act. The Plaintiff had been convicted of murder in 1992 and was serving a lengthy sentence. The term of imprisonment had not expired when the visa was

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<sup>179</sup> Ibid.

<sup>180</sup> Ibid.

<sup>181</sup> Ibid 194 (Brennan J).

<sup>182</sup> Ibid 211 (Deane and Gaudron JJ).

<sup>183</sup> Ibid 223 (Dawson J), 233 (Toohey J).

<sup>184</sup> Ibid.

<sup>185</sup> *Migration Act 1958* (Cth) s 501G(1)(e): described as forming part of the ‘written notice’ of the decision to cancel or refuse the grant of visa.

<sup>186</sup> Ibid s 501G(4): ‘[a] failure to comply with this section in relation to a decision does not affect the validity of the decision.’

cancelled. He had never taken up Australian citizenship and had resided in Australia on a transitional visa.<sup>187</sup>

The Minister cancelled the visa on the basis of a departmental recommendation that contained four options, exercising his power under the section by crossing out three of those four options. The recommendations were then provided to the Plaintiff in purported satisfaction of the requirement under s 501 to give reasons. The Plaintiff challenged the Minister's decision on the basis of having been denied procedural fairness, because he had not been given the departmental recommendation and had no opportunity to comment upon it. In addition, he argued that the recommendations did not amount to reasons of the Minister and consequently the obligation to give reasons had not been met and the decision was invalid.

*Palme* is of particular interest as it came shortly after the High Court's privative clause decision in *Plaintiff S157* where the Hickman Provisos were 'placed in perspective'.<sup>188</sup> Relevantly, *Palme* dealt with s 501G(4) of the Migration Act, which is a no-invalidity clause. Section 501G(4) purported to validate decisions taken under s 501, notwithstanding a failure by the Minister to provide reasons in accordance with the requirement to do so. Chief Justice Gleeson, and Gummow and Heydon JJ formed the majority. Their Honours approached the question of validity by applying the test articulated by the majority in *Project Blue Sky*.<sup>189</sup> As discussed above, this involves determining whether it was a purpose of the legislation that a breach of a particular requirement should result in invalidity.<sup>190</sup>

[A]s *Project Blue Sky* emphasized, [whether the issue of reasons is a condition precedent to the exercise of power under section 501] depends upon the construction of the Act to determine whether it was a purpose of the Act that an act done or not done, in breach of the provision, should be invalid.

The application of *Project Blue Sky* test necessarily implies that no inconsistency arises between the no-invalidity clause and the requirements under the act in question. Indeed, in *Palme* the majority said as much.<sup>191</sup> Justice McHugh arrived at the same conclusion.<sup>192</sup> His Honour found that the main question was whether it was the purpose of the Migration Act that the breach of the requirement spelled invalidity for the decision.<sup>193</sup> His Honour's conclusion was commensurate with the majority, the failure to provide

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<sup>187</sup> A Transitional Visa is a type of permanent visa that came into effect on 1 September 1994 by operation of the *Migration Reform (Transitional Provisions) Regulations 1994* (Cth) (repealed). The purpose of the Transitional Visa was to allow for holders of particular visas to be transitioned onto permanent visas.

<sup>188</sup> *Futuris* (2008) 237 CLR 146, 167 [67] (Gummow, Hayne, Heydon and Crennan JJ).

<sup>189</sup> See *Project Blue Sky* (1998) 194, CLR 355, 390-1 (McHugh, Gummow, Kirby and Hayne JJ).

<sup>190</sup> *Palme* (2003) 216 CLR 212, 225 [44] (Gleeson CJ, Gummow and Heydon JJ).

<sup>191</sup> *Ibid* 215 [4], 222 [33] (Gleeson CJ, Gummow and Heydon JJ).

<sup>192</sup> *Ibid* 227 [55] (McHugh J).

<sup>193</sup> *Ibid*.

reasons did not invalidate the Minister's decision to cancel the visa, but review for jurisdictional error arising on other grounds was available.<sup>194</sup>

Dissenting in *Palme*, Kirby J outlined an interesting perspective. His Honour raised the question of whether no-invalidity clauses were unconstitutional.<sup>195</sup> This question was not raised in argument or addressed by the majority and Kirby J himself did not answer it. His Honour only raised the point, observing that an enactment, such as s 501G(4) of the Migration Act, might raise a question of constitutional validity because of its attempt in 'undiscriminating terms to uphold a decision made by a Minister in apparent non-compliance with requirements stated in some detail by the Parliament.'<sup>196</sup> Justice Kirby left the question unresolved.

The view that the requirement of the Minister to provide reasons became inessential for the validity of the decision because of s 501G(4) was, according to Kirby J, incorrect. Justice Kirby concluded that the rights of the German national were to be determined by reference to the decision of the Minister, until such time as that decision was reviewed.<sup>197</sup> This view was similar to a previous decision of the High Court, where McHugh and Gaudron JJ had taken a similar view of s 69 of the Migration Act in *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* ('*Miah*').<sup>198</sup> Ultimately, notwithstanding the no-invalidity clause in s 501G(4), Kirby J found that jurisdictional error arose from the failure to give reasons, because without reasons, it was only a small step to conclude that the Minister had failed to take into account considerations necessary for the making of a lawful decision.<sup>199</sup>

### 3 *Federal Commissioner of Taxation v Futuris Corporation Pty Ltd*

The same sections that were considered in *Richard Walter* again came before the High Court in *Futuris*. That is, the broad no-invalidity clause in s 175, and ss 175A and 177(1) of the Tax Act. The allegation in this case was that the Commissioner had fallen into jurisdictional error by not acting bona fide in the income tax assessment process and had 'double counted' in the application of various anti-avoidance provisions. *Futuris* sought review through Part IVC of the Tax Admin Act but also sought judicial review of the Commissioner's assessment.

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<sup>194</sup> Ibid 225 [46] (Gleeson CJ, Gummow and Heydon JJ), 228 [57] (McHugh J).

<sup>195</sup> Ibid 247 [120] (Kirby J).

<sup>196</sup> Ibid.

<sup>197</sup> Ibid 249 [125] (Kirby J) citing *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57, 88 [104] (Gaudron J), 98 [110] (McHugh J) ('*Miah*').

<sup>198</sup> *Miah* (2001) 206 CLR 57, 88 [104] (Gaudron J), 98 [110] (McHugh J).

<sup>199</sup> *Palme* (2003) 216 CLR 212, 250 [127] (Kirby J) citing *Public Service Board (NSW) v Osmond* (1986) 159 CLR 656, 663-4; *Miah* (2001) 205 CLR 57, 81-82 [80]-[81] (Gaudron J).



The majority gave effect to the no-invalidity clause in s 175. The High Court held that '[w]here section 175 applies errors do not go to jurisdiction and therefore do not attract a remedy under section 75(v).'<sup>200</sup> Determining whether a breach of a particular statutory requirement meant that the decision of the Commissioner was invalid, was to be determined by the test applied in *Project Blue Sky*.<sup>201</sup>

[T]he question for the present case is whether it is a purpose of the [Tax Act] that a failure by the Commissioner in the process of assessment to comply with provisions of the [Tax Act] renders the assessment invalid; in determining the legislative purpose regard must be had to the language of the relevant provisions and the scope and purpose of the statute.

Essentially, the Court read ss 175 and 177 of the Tax Act to mean that no invalidity could be founded on the basis of a failure to comply with the requirements of the Tax Act, but a taxpayer who wanted to challenge the decision could do so under the Part IVC proceedings in the Tax Admin Act.<sup>202</sup>

This gave virtually full effect to the broad no-invalidity clause, the practical effect of which was to circumvent the High Court's jurisdiction under s 75(v).<sup>203</sup> The majority rejected the argument that s 175 was a privative clause and observed that no inconsistency actually arose between that section and the requirements under the Tax Act.<sup>204</sup> Reliance was placed on the judgment of Dawson J in *Richard Walter* and the observation his Honour made that without that inconsistency there is no need for the reconciliation of the kind that was necessary in *Hickman*; or, in *Plaintiff S157*.<sup>205</sup> However, the majority recognised that for the protection of s 175 to be enlivened the Commissioner needed to make an 'assessment'. 'Tentative' or 'purported' assessments, or assessments not made bona fide were not assessments that attracted the protection of s 175.<sup>206</sup> So, the no-invalidity clause still had its limits.

Once again, Kirby J drew attention to the fact that no question had been raised about the constitutional validity of the no-invalidity clause.<sup>207</sup> Justice Kirby outlined two issues that his Honour believed were of concern regarding the operation of both ss 175 and 177 of the Tax Act. The first was the constitutional validity of those sections.<sup>208</sup> Second, whether there needed to be more than legal error and whether such an error took the Commissioner outside his lawful jurisdiction and power.<sup>209</sup> Justice Kirby did not

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<sup>200</sup> *Futuris* (2008) 237 CLR 146, 157 (Gummow, Hayne, Heydon and Crennan JJ).

<sup>201</sup> *Ibid* 156-7 (Gummow, Hayne, Heydon and Crennan JJ).

<sup>202</sup> *Ibid*.

<sup>203</sup> For discussion of this point, see generally, Noonan, above n 8, 456-60.

<sup>204</sup> *Futuris* (2008) 237 CLR 146, 157 [25] (Gummow, Hayne, Heydon and Crennan JJ).

<sup>205</sup> *Ibid* 167 [67] (Gummow, Hayne, Heydon and Crennan JJ).

<sup>206</sup> *Ibid* 157 [25] (Gummow, Hayne, Heydon and Crennan JJ).

<sup>207</sup> *Ibid* 182 [122] (Kirby J).

<sup>208</sup> *Ibid*.

<sup>209</sup> *Futuris* (2008) 237 CLR 146, 182 [122] (Kirby J).

address either question because they did not form part of the record.<sup>210</sup> He did, however, refer to s 175 as a ‘privative type provision’,<sup>211</sup> which is indicative of his Honour’s previous treatment of no-invalidity clauses in general.

D      *What are the limits beyond which a ‘no-invalidity’ clause cannot reach?*

The essential question, in light of the High Court’s willingness to give effect to no-invalidity clauses, is what are the limits beyond which they cannot reach? In *Futuris*, s 175 of the Tax Act was considered to operate only insofar as there was something that answered the statutory description of an ‘assessment’.<sup>212</sup> Its operation did not extend to ‘purported’ or ‘tentative’ assessments, or assessments that were not made bona fide.<sup>213</sup> However, the clause was otherwise effective to preserve assessments outside of the Part IVC proceedings in the Tax Admin Act from invalidity arising from a breach of statutory requirements.

Ultimately, those rights under Part IVC of the Tax Admin Act provided extensive opportunity for the correction of legal errors. In *Futuris*, the majority read s 175 in conjunction with s 177 and concluded that the validity of an assessment was not affected by any failure to adhere to the requirements under the Tax Act. A dissatisfied taxpayer could appeal an assessment under Part IVC of the Tax Admin Act.<sup>214</sup> That finding led to the conclusion that where s 175 applied, errors in the process of assessment did not go to jurisdiction and no remedy under s 75(v) was available.<sup>215</sup> If no such appeal and review rights existed would the provision have had the same effect? If no-invalidity clauses are effective at circumventing the entrenched minimum provision of judicial review, then the claimed protection it offers to the rule of law is insignificant. In Chapter III it will be demonstrated that the High Court looks to substance and not form when asking the question of whether its jurisdiction under s 75(v) has been impeded. No-invalidity clauses circumvent this jurisdiction, which appears to make it difficult to reconcile the decisions of *Futuris* and *Palme* with the jurisprudence on s 75(v) more broadly.

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<sup>210</sup> Ibid 185 [131] (Kirby J)

<sup>211</sup> Ibid 183-4 [128] (Kirby J).

<sup>212</sup> Ibid 157 (Gummow, Hayne, Heydon and Crennan JJ).

<sup>213</sup> It is worth noting that the ‘bona fide’ requirement identified by the majority in *Futuris* does not arise in a manner similar to, or as part of, the *Hickman* approach. Instead, the requirement of the Commissioner to act bona fide arises purely because a decision maker must not act knowingly in excess of their power, which is attributed to the Commissioner in the same way that it applies generally in public law; see generally, *Sanders v Snell* (1998) 196 CLR 329, 346-347.

<sup>214</sup> *Futuris* (2008) 237 CLR 146, 157 (Gummow, Hayne, Heydon and Crennan JJ).

<sup>215</sup> Ibid.

## E      *Concluding Remarks*

Judicial consideration of privative clauses has significantly informed our understanding of legislative restrictions on judicial review and the general scope of s 75(v). The jurisprudence surrounding privative clauses and the entrenched minimum provision of judicial review is essential reading for understanding how no-invalidity clauses have been interpreted and how those clauses interact with the minimum provision of judicial review. With the decision in *Futuris*, the High Court has indicated an intention to give effect to broad no-invalidity clauses on the basis that no inconsistency, of the nature that arises with privative clauses, exists. Justice Kirby, on a number of occasions, did raise concern over whether no-invalidity clauses are consistent with the entrenched minimum provision of judicial review at all, a concern which will be discussed in the next chapter. However, his Honour's concerns may be well placed, but ultimately the consistency of no-invalidity clauses with s 75(v) will be a question of substance and degree.

### III. NO-INVALIDITY CLAUSES AND SECTION 75(v)

#### A *Introduction*

When the High Court handed down its decision in *Plaintiff S157*, it was clear that the Court would continue to jealously guard its jurisdiction to review for jurisdictional error. The recognition of an entrenched minimum provision of judicial review left commentators scrambling to discern how the extent of this minimum provision was to be delineated.<sup>216</sup> The High Court did very little to assist them.<sup>217</sup> Since then, the Court has dealt with a number of significant judicial review cases and has repeatedly reaffirmed its commitment to the entrenchment of a minimum provision of judicial review.<sup>218</sup> However, the precise underlying approach that informs the scope of this minimum provision remains murky. Some insight into its operation has been revealed by the Court's willingness to look to substance over form when determining if a legislative restriction on judicial review infringes upon s 75(v).<sup>219</sup> This will be explored in Part C of this chapter. For the interpretation of no-invalidity clauses, the substance over form approach is significant. The practical effect of a no-invalidity clause, in circumventing the High Court's jurisdiction under s 75(v), may in substance impede the entrenched minimum provision of judicial review.

In *Futuris* the Court did not consider this question, but acknowledged that a broad no-invalidity clause did have its limits. To understand these limits the scope of the entrenched minimum provision of judicial review must be understood. This chapter will deal with, first, whether no-invalidity clauses are expressly inconsistent with s 75(v). Second, it will demonstrate, with case examples, that the High Court has consistently applied an approach to legislative restrictions on judicial review that looks to substance over form. However, the Court has shown a reluctance to treat every statutory device that appears to, in substance, prevent the exercise of the Court's jurisdiction under s 75(v) as invalid. For example, in *Futuris* and *Palme*. The question of whether a legislative restriction on judicial review interferes with s 75(v) in substance will depend on the Court's understanding of the scope of the minimum provision of judicial review.

#### B *Are no-invalidity clauses expressly inconsistent with section 75(v)?*

The question of whether no-invalidity clauses are inconsistent with s 75(v) can be disposed of swiftly. Section 75(v) is concerned only with a grant of jurisdiction. The High Court is vested with original

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<sup>216</sup> See, eg, Kirk, above n 16; Bateman, above n 6; McDonald, above n 8; Noonan, above n 8.

<sup>217</sup> Kirk, above n 16, 64.

<sup>218</sup> See discussion in Chapter I, Part B.1.

<sup>219</sup> *Graham* (2017) 91 ALJR 890, 902 [42]-[48] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).

jurisdiction to hear applications for the constitutional writs of prohibition and mandamus, and for injunction.<sup>220</sup> This grant of jurisdiction is not concerned with the principles of substantive law upon which it is to be exercised.<sup>221</sup> In *Parisiennne Basket Shoes Pty Ltd v Whyte*,<sup>222</sup> Dixon J pointed out the importance of understanding the distinction between the existence of jurisdiction and the manner of its exercise.<sup>223</sup> Cognisance of this distinction reveals that no express inconsistency exists. No-invalidity clauses operate upon the substantive law and not the jurisdiction of the High Court to issue the constitutional writs. This can be better understood if contrasted with privative clauses.

A privative clause specifically targets the jurisdiction of the Court to conduct judicial review. To the extent that it precludes review for jurisdictional error, a privative clause is expressly inconsistent with the grant of jurisdiction under s 75(v).<sup>224</sup> In contrast, no-invalidity clauses target substantive requirements under the legislation that empower the decision maker.<sup>225</sup> The result is that there is no direct inconsistency between no-invalidity clauses and s 75(v). The case law reflects this position. In *Richard Walter*, Deane and Gaudron JJ said that the operation of s 175 of the Tax Act was only concerned with the substantive law in the exercise of the Commissioner's jurisdiction.<sup>226</sup> The same observation was made by the majority in *Futuris*.<sup>227</sup> The operation of a no-invalidity clause does not directly impede the jurisdiction of the Court to conduct judicial review. Consequently, no express inconsistency with s 75(v) arises.

### C      *Practical effect: substance over form*

The High Court has indicated an intention to approach legislative restrictions on judicial review, in light of s 75(v), with substance as its focus. As recently as last year, the Court declared that the question of interference with its jurisdiction under s 75(v) was one of 'substance and degree'.<sup>228</sup> The following cases demonstrate that the High Court has applied this approach to various forms of legislative restrictions on judicial review. The first case, *Graham v Minister for Immigration and Border*

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<sup>220</sup> *Australian Constitution* s 75(v).

<sup>221</sup> *Richard Walter* (1995) 183 CLR 168, 209 (Gaudron and Deane JJ).

<sup>222</sup> (1938) 59 CLR 369.

<sup>223</sup> *Ibid* 389 (Dixon J).

<sup>224</sup> See generally, *Plaintiff S157* (2003) 211 CLR 476.

<sup>225</sup> Burton Crawford, above n 86, 81-2.

<sup>226</sup> *Richard Walter* (1995) 183 CLR 168, 209 (Deane and Gaudron JJ).

<sup>227</sup> *Futuris* (2008) 237 CLR 146, 157 [25] (Gummow, Hayne, Heydon and Crennan JJ).

<sup>228</sup> *Graham* (2017) 91 ALJR 890, 902 [42]-[48] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ); see also the comments of Callinan J in *Plaintiff S157* (2003) 211 CLR 476, 537 [173].

*Protection* ('*Graham*'),<sup>229</sup> deals with a substantive restriction on judicial review presented by powers to withhold evidence.

# 1 *Graham v Minister of Immigration and Border Protection*

Section 503A of the Migration Act provided that the Minister was not required to furnish information associated with a s 501 character cancellation, if that information was communicated by a gazetted agency on condition of its confidentiality.<sup>230</sup> The Plaintiff sought a writ of prohibition to prevent the Minister cancelling his visa under s 501 of the Migration Act. The Plaintiff also argued that s 503A was invalid. Of the two grounds of invalidity advanced by the Plaintiff, the second is of particular relevance here. The Plaintiff argued that by limiting the right or ability of an aggrieved person to seek relief under s 75(v), s 503A was inconsistent with the place and purpose of s 75(v). The argument was successful.

The High Court issued the writs of prohibition and certiorari. Crucially, the majority stated in emphatic terms that the question of whether a provision in an act transgresses the limitation imposed by s 75(v) is one of substance and degree.<sup>231</sup> The majority said the following:<sup>232</sup>

The question of whether or not a law transgresses [the limitation imposed by section 75(v)] is one of substance, and therefore of degree. To answer it requires an examination not only of the legal operation of the law but also of the practical impact of the law on the ability of a court, through the application of the judicial process, to discern and declare whether or not the conditions of and constraints on the lawful exercise of the power conferred on an officer have been observed in a particular case.

The majority, made up of Kiefel CJ and Bell, Gageler, Keane, Nettle and Gordon JJ, applied the rationale of *Plaintiff S157*. Their Honours concluded that the provision in s 503A, enabling the Minister to withhold confidential information, specifically undermined the ability of the High Court to conduct judicial review under s 75(v).<sup>233</sup>

Allowing the Minister to withhold key information, upon which the decision was made, the section imposed a rigid and inflexible limit on the Court's ability to obtain evidence specifically relevant to the question of whether the Minister had acted within the power conferred by the Migration Act. In this way, s 503A curtailed the capacity of the Court to exercise its jurisdiction under s 75(v) and the section was invalid to the extent that it applied to prevent the Minister from divulging information to the High

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<sup>229</sup> (2017) 91 ALJR 890.

<sup>230</sup> *Migration Act 1958* (Cth) s 503A.

<sup>231</sup> *Graham* (2017) 91 ALJR 890, 902 [48] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).

<sup>232</sup> *Ibid.*

<sup>233</sup> *Ibid* 906 [64] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).

Court when exercising its jurisdiction under s 75(v).<sup>234</sup> This rationale found some basis in the Court's earlier decision of *Bodruddaza v The Minister for Immigration and Indigenous Affairs* ('*Bodruddaza*').<sup>235</sup>

## 2 *Bodruddaza v Minister for Immigration and Indigenous Affairs*

A mandatory time limitation under s 486A of the Migration Act prohibited application to the High Court for review of a migration decision if it was after 84 days of the decision having been made. Section 486A was a 'time clause'. Time clauses limit the opportunity of persons affected by decisions to seek judicial review. The provision also prevented, under subsection (2), the issuing of remedies by the Court if the application was made out of time.<sup>236</sup>

Neither the Minister, nor any of the intervening parties, challenged the assertion that s 486A would be invalid if it operated to direct the manner in which the judicial power of the Commonwealth should be exercised. Justice Callinan had previously held s 486A invalid in *Plaintiff S157*.<sup>237</sup> His Honour held that the section was 'in substance a prohibition' on the Court's exercise of jurisdiction under s 75(v).<sup>238</sup> The question for the High Court on this occasion was, to what extent can Parliament prevent access to s 75(v) without treading on the entrenched minimum provision of judicial review?<sup>239</sup>

The majority reaffirmed that it was beyond the power of the legislature, through the enactment of ordinary legislation, to limit the right or ability of a person to seek relief under s 75(v).<sup>240</sup> Their Honours said that if a legislative device was inconsistent with the place and purpose of s 75(v) it would infringe upon the entrenched minimum provision of judicial review.<sup>241</sup> The majority remarked that legislation would be inconsistent with s 75(v) if it were to 'so curtail or limit the right or ability of applicants to seek relief under section 75(v) as to be inconsistent with the place of that provision in the constitutional structure.'<sup>242</sup> The mandatory time frame was not expressly inconsistent with section 75(v). However, in effect, s 486A made it impossible for the Plaintiff, who had only a limited understanding of English, to

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<sup>234</sup> *Graham* (2017) 91 ALJR 890, 906 [66] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ). The Court here also made the observation that this includes the Federal Court exercising its jurisdiction under s 476A of the Migration Act to review a purported exercise of power under s 501 by the Minister.

<sup>235</sup> (2007) 228 CLR 651.

<sup>236</sup> *Migration Act 1958* (Cth) s 486A.

<sup>237</sup> *Plaintiff S157* (2003) 211 CLR 476, 537-8 [173]-[177] (Callinan J).

<sup>238</sup> *Ibid* 537 [173]-[174] (Callinan J).

<sup>239</sup> *Bodruddaza* (2007) 228 CLR 651, 671 [51] (Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ).

<sup>240</sup> *Ibid* 668-69 [45]-[46] (Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ).

<sup>241</sup> *Ibid* 668-69 [46] (Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ) citing *Plaintiff S157* (2003) 211 CLR 476, 513-14 [104] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

<sup>242</sup> *Ibid* 671 [53] (Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ).

seek relief under s 75(v). Section 75(v) gives textual reinforcement to the rule of law and operates, as an accountability measure, to ensure officers of the Commonwealth take decisions according to law.<sup>243</sup> A provision that limits the timeframe within which to apply for judicial review under s 75(v), such that for all intents and purposes review is prevented from taking place, is inconsistent with the accountability function of s 75(v). On that basis, s 486A was declared invalid.<sup>244</sup>

The threads of this reasoning can be seen echoed in *Graham*. Indeed, in *Graham* the Court reasoned that the imposition of a blanket and inflexible time limit was analogous to the inability of the Court to access evidence relating to the review process.<sup>245</sup> The basis of invalidity was that the practical effect of the time clause was to deprive the Court of its jurisdiction to review a particular migration decision for jurisdictional error.<sup>246</sup> In both cases the problem arose from the deliberate effort by parliament to circumvent the constitutionally entrenched jurisdiction of the High Court. As a result, the provisions are invalid to the extent that they do so. It is not permissible for the parliament to do indirectly, what it cannot do directly.<sup>247</sup> It is unclear where *Futuris* and *Palme* sit in relation to the cases described. No-invalidity clauses are practical inhibitors of judicial review and yet the Court has so far seen fit to give them virtually full effect. There is an apparent inconsistency in the High Court's approach to the confidentiality clause in *Graham*, the time clause in *Bodruddaza* and the no-invalidity clauses in *Palme* and *Futuris*. However, *Bodruddaza* and *Graham* are to be contrasted with *Plaintiff M61/2010E v The Commonwealth* ('*Plaintiff M61*').<sup>248</sup>

### 3 *Plaintiff M61/2010E v The Commonwealth*

In *Plaintiff M61*, the High Court was asked, amongst other questions, to consider whether s 46A(7) of the Migration Act infringed upon the jurisdiction conferred by s 75(v).<sup>249</sup> Section 46A relevantly empowered the Minister under subsection (2) to exclude an unauthorized maritime arrival (or, offshore entry person) from the application of subsection (1).<sup>250</sup> Subsection (1) prevented the unauthorized

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<sup>243</sup> *Plaintiff S157* (2003) 211 CLR 476, [5] (Gleeson CJ), 513-514 [103]-[104] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ); *Graham* (2017) 91 ALJR 890, 902 (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).

<sup>244</sup> *Bodruddaza* (2007) 228 CLR 651, 672 [60] (Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ).

<sup>245</sup> *Graham* (2017) 91 ALJR 890, 903 [49] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).

<sup>246</sup> *Ibid*.

<sup>247</sup> *New South Wales v Commonwealth* (2006) 229 CLR 1, 130 [228] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ); *Re Pacific Coal Pty Ltd; Ex parte Construction, Forestry, Mining and Energy Union* (2000) 203 CLR 346, 359-60 (Gleeson CJ) citing *Caltex Oil (Australia) Pty Ltd v Best* (1990) 170 CLR 516, 522 (Mason CJ, Gaudron and McHugh JJ).

<sup>248</sup> (2010) 243 CLR 316.

<sup>249</sup> *Ibid* 316-7 (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).

<sup>250</sup> *Migration Act 1958* (Cth) s 46A(2).



maritime arrival from applying for a visa.<sup>251</sup> Section 46A(7) made the decision under s 46A(2) of whether to consider allowing an unauthorized maritime arrival to apply for a visa discretionary.<sup>252</sup> At a superficial level this would appear to circumvent the jurisdiction to grant mandamus under s 75(v) because there is no duty for which mandamus will compel performance. The Plaintiff's argument reflected this point. It closely echoed remarks made by the majority in *Plaintiff S157*.<sup>253</sup>

It was argued that s 46A(7) effectively conferred upon the Minister an unfettered and unreviewable statutory power to decide whether or not an offshore entry person could make a valid visa application.<sup>254</sup> This, it was suggested, lacked the required content to constitute an exercise of legislative power. But for the operation of subsection (7), the Minister would have had a duty to consider exercising the power and could exercise that power if it was 'in the public interest' to do so.<sup>255</sup> The existence of subsection (7) effectively circumvented the High Court's jurisdiction to compel the exercise of the power through the writ of mandamus, suggesting that the power had no judicially enforceable limitations. On that account, the provision was alleged to be inconsistent with the place and purpose of s 75(v) in the constitutional structure.<sup>256</sup>

This argument resonates deeply with the subject matter at the centre of this thesis. Despite the obvious differences between the exercise of a discretionary power and a no-invalidity clause, it is possible to draw an analogy between them. Section 46A(7) is a plenary provision.<sup>257</sup> It shares a close resemblance to a no-invalidity clause.<sup>258</sup> Unlike the previous two examples provided in this part, the discretionary power more closely resembles the no-invalidity clause because the focus of its operation is on the substantive law to be applied, rather than on the jurisdiction of the Court. The Court resoundingly rejected the Plaintiff's argument. The relevant content of the provision was expressed as the Minister

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<sup>251</sup> Ibid s 46A(1).

<sup>252</sup> Ibid s 46A(7).

<sup>253</sup> *Plaintiff S157* (2003) 211 CLR 476, 512-13 (Gaudron, McHugh, Gummow, Kirby and Hayne JJ): the majority made remarks about open ended discretions and that they may lack the character of a law that is amenable to judicial enforcement.

<sup>254</sup> *Plaintiff M61* (2010) 243 CLR 316, 336 [16] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).

<sup>255</sup> *Migration Act 1958* (Cth) s 46A(2).

<sup>256</sup> *Plaintiff M61* (2010) 243 CLR 316, 346-7 [56]-[57] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).

<sup>257</sup> A plenary provision is a provision that expands the power of a decision maker by removing substantive restrictions on the exercise of the power, for example, by providing that non-compliance with the requirements will not invalidate the decision (no-invalidity clause), specifically removes a substantive ground of review, or empowers a decision maker to excise a power that is beyond the 'subject matter, scope and purpose' of the Act in question, for discussion see generally, Bateman, above n 6, 466-7.

<sup>258</sup> Burton Crawford, above n 86, 89.

having discretion, that is ‘the Minister may... but need not consider whether to’ exercise the power.<sup>259</sup> The Court was unanimous in its decision, stating:<sup>260</sup>

[The] grant of power on the terms set out in s 46A(7) does not clash with s 75(v), or with its place and purpose in the *Constitution*. Maintenance of the capacity to enforce the limits on power does not entail that consideration of the exercise of a power must always be amenable to enforcement...

If the power is exercised, then the exercise of the power is capable of being subject to review under s 75(v).<sup>261</sup> However, the decision of whether or not to exercise the power cannot be the subject of review and no writ of mandamus can issue to compel it.<sup>262</sup>

Despite a clear emphasis on substance over form, the High Court rejected the suggestion that such a broad discretion precluded the Court’s exercise of jurisdiction under s 75(v). The power in question is only the discretion of whether to consider exercising a statutory power. All s 46A(7) did was preclude the Court, indirectly, from compelling the consideration of the exercise of the statutory power. It did not prevent the Court from reviewing the exercise of the statutory power itself.<sup>263</sup> The requirement imposed by the place of s 75(v) in the constitutional structure and purpose of s 75(v) as an accountability measure, is that the exercise of Commonwealth administrative power be amenable to judicial oversight and that the grant of power by parliament have limitations capable of enforcement.<sup>264</sup> In this case, the fact that the Minister could exercise his/her discretion as to whether to consider the exercise of the power said nothing about the supervision of the power itself. Accordingly, there was no question of the Minister being able to exercise power that had no oversight for accountability purposes. The result, was that s 46A(7) made no intrusion on s 75(v) in form or in substance, because it was not inconsistent with the place and purpose of s 75(v).

#### D Concluding Remarks

This chapter has sought to demonstrate that whilst no-invalidity clauses are not expressly inconsistent with s 75(v) of the *Constitution*, the question is one of substance and degree. The Court has shown a reluctance to treat every statutory device that appears to, in substance, prevent the exercise of the High Court’s jurisdiction under s 75(v) as invalid. This raises the question of how much interference is to be

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<sup>259</sup> *Plaintiff M61* (2010) 243 CLR 316, 346-7 [56] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).

<sup>260</sup> *Ibid* 347 [57] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).

<sup>261</sup> *Ibid* 347 [59] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).

<sup>262</sup> *Ibid* 347 [57] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).

<sup>263</sup> *Ibid*.

<sup>264</sup> *Plaintiff S157* (2003) 211 CLR 476, 482-3 [5] (Gleeson CJ), 513-4 [104] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ); *Bodruddaza* (2007) 228 CLR 651, 668 [46] (Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ); *Plaintiff M61* (2010) 243 CLR 316, 345-6 [53] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ); *Bank of New South Wales* (1951) 83 CLR 1, 193 (Dixon J).

permitted. Consideration of the Court's treatment of s 175 of the Tax Act in *Futuris*, in comparison with the case illustrations in this part, indicates that the approach is variable depending on the statutory context. There is an underlying approach that is guiding the Court in making its assessment of whether a particular provision intrudes upon the minimum provision of judicial review. In the following two chapters it will be demonstrated that this underlying principle is the rule of law, in concert with a broader approach to administrative accountability.

## IV. EXPLORING THE SCOPE OF THE ENTRENCHED MINIMUM PROVISION OF JUDICIAL REVIEW

### A *Introductory Remarks*

The aim of this chapter is to highlight a principled approach that can explain the High Court's view of the scope of the entrenched minimum provision of judicial review. Once this is achieved, a more complete picture of the Court's treatment of no-invalidity clauses will be attainable. Parliament cannot revoke the jurisdiction to grant relief under s 75(v) where jurisdictional error is found.<sup>265</sup> Accordingly, this chapter will first consider the capacity of jurisdictional error to inform the scope of the entrenched minimum provision of judicial review. However, jurisdictional error is undefinable in substance and circular in its application, making it ill-equipped for the task. The inquiry will then be directed to the rule of law, because of its central place in s 75(v) jurisprudence. The need to prevent the exercise of arbitrary, or unconstrained administrative decision making is a key rationale underlying the place and purpose of s 75(v) in the *Constitution*. Consideration of the rule of law, to which s 75(v) gives effect,<sup>266</sup> in concert with a broader approach to administrative accountability, has a much greater capacity for lending meaning to the minimum provision of judicial review. The approach is not perfect, it lacks the clarity and definition of a doctrinal approach. However, it provides the best explanation of the High Court's jurisprudence on the entrenched minimum provision of judicial review so far.

### B *The role of jurisdictional error in informing the scope of section 75(v)*

In attempting to delineate the scope of the entrenched minimum provision of judicial review, jurisdictional error must be central to any discussion. Its importance as a constitutional concept has been underlined by *Plaintiff S157*. However, its use as a principle upon which to ground an understanding of the scope of the minimum provision of judicial review is severely limited. For the jurisdiction to issue the constitutional writs to be enlivened jurisdictional error must be established.<sup>267</sup> In this way, jurisdictional error operates as central to the inquiry. However, jurisdictional error is not a ground of review, rather, it is the outcome of successfully establishing a ground of review. Mark Aronson keenly observed that jurisdictional error is a means of stating a conclusion with respect to

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<sup>265</sup> *Plaintiff S157* (2003) 211 CLR 476, 482-3 [5] (Gleeson CJ), 513-4 [104] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

<sup>266</sup> *Ibid* 482-3 [5] (Gleeson CJ), 513 [103] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

<sup>267</sup> *Ibid* 506 [76] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ); *Futuris* (2008) 237 CLR 146, 162 (Gummow, Hayne, Heydon and Crennan JJ); *Graham* (2017) 91 ALJR 890, 913 [102] (Edelman J); see also, French, above n 79, 45.

legality, rather than a test for legality itself.<sup>268</sup> Similar observations have been made by Basten<sup>269</sup> and Leeming JJ,<sup>270</sup> and Charles Noonan.<sup>271</sup> Relying upon jurisdictional error, although central to the inquiry as the key unifying concept of Australian Administrative law,<sup>272</sup> will lead our inquiry astray, principally, because of its conclusory status.

There are two key reasons why jurisdictional error provides limited assistance in clarifying the limits of the constitutionally entrenched provision for judicial review. Each is related to the other, but it is helpful to consider them separately. First, relying upon jurisdictional error to explain the High Court's understanding of the scope of the minimum provision of judicial review leads to the conclusion that some of the grounds of review are themselves entrenched. This conclusion is unworkable. The grounds giving rise to jurisdictional error are not closed<sup>273</sup> and it is firmly accepted that some grounds, for example procedural fairness, can be excluded by clear words.<sup>274</sup> It is unclear which grounds would be constitutionally protected and which would not. The result is a principle of unidentifiable and undefinable content. Second, identifying jurisdictional error involves a process of statutory interpretation that depends entirely on the statute empowering the decision maker. This necessitates that the legislature could circumvent s 75(v). A position that has been demonstrated as untenable.

# 1 *Unidentifiable and undefinable content*

In order for jurisdictional error to provide the foundation from which to delineate the scope of the minimum content of judicial review, it must contain identifiable and definable content itself. Jurisdictional error hinges upon the success of a ground of review.<sup>275</sup> For example, jurisdictional error will be established if there is denial of procedural fairness, a failure to consider mandatory relevant considerations, unreasonableness and so on.<sup>276</sup> If jurisdictional error is the informing principle, the question giving rise to the jurisdictional error, i.e. the ground of review, must form part of the inquiry.

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<sup>268</sup> Aronson, above n 73, 333.

<sup>269</sup> J Basten, 'Jurisdictional Error after *Kirk*: Has it a future?' (2012) 23 *Public Law Review* 94, 105.

<sup>270</sup> Leeming, above n 67, 140.

<sup>271</sup> Noonan, above n 8, 451; see also Spigelman, above n 73, 15.

<sup>272</sup> Spigelman, above n 73, 5.

<sup>273</sup> Mark Aronson and Matthew Groves, *Judicial Review of Administrative Action* (Lawbook, 5<sup>th</sup> ed, 2013), 8.

<sup>274</sup> *Jarrat v Commissioner of Police for New South Wales* (2005) 224 CLR 44, [24] (Gleeson CJ), [51] (McHugh, Gummow and Hayne JJ); *Annetts v McCann* (1990) 170 CLR 596, 598 (Mason CJ, Deane and McHugh JJ); *Twist v Randwick Municipal Council* (1976) 136 CLR 106, 110 (Barwick CJ).

<sup>275</sup> *Craig* (1995) 184 CLR 163, 179 (Brennan, Deane, Toohey, Gaudron and McHugh JJ); *Yusuf* (2001) 206 CLR 323 [80] (McHugh, Gummow and Hayne JJ, with whom Gleeson CJ and Gaudron J agreed); see also Mark Aronson and Matthew Groves, *Judicial Review of Administrative Action* (Lawbook, 5<sup>th</sup> ed, 2013) 17-18.

<sup>276</sup> For an extensive list and discussion of the grounds of review giving rise to jurisdictional error, see generally, The Administrative Review Council's Discussion Paper, *The Scope of Judicial Review*, 2003, 50-65; Leeming,

As Leighton McDonald has correctly observed, if none of the grounds of review are subject to constitutional protection, then jurisdictional error can be excluded entirely and there is no content to the minimum provision of judicial review in s 75(v).<sup>277</sup> Conversely, it is equally impossible to conclude that each of the grounds of judicial review find protection from legislative exclusion in s 75(v). As mentioned in the introduction to this part, there has always been a firmly accepted view that procedural fairness can be excluded by clear words.<sup>278</sup> Likewise, in *Palme* the High Court was willing to accept that no jurisdictional error could arise specifically from the failure to provide reasons on account of s 501G(4).<sup>279</sup> Where, then, is the line to be drawn? It is for the legislature to shape the jurisdiction of the decision maker. In attempting to resolve the problem of identifying which grounds were entrenched, and which were not, Jeremy Kirk distinguished between grounds of review arising from statute and at Common law.<sup>280</sup> However, this is liable to raise more questions. McDonald highlighted the difficulty associated with drawing such a distinction, pointing out that there is an ongoing debate over whether procedural fairness arises from the Common law or from statute.<sup>281</sup> On the basis of these observations, it is ahistorical to conclude that the substantive grounds of review are themselves entrenched in the constitution.

McDonald added that the use of jurisdictional error as the defining principle would leave judges with significant discretion in the absence of any guidance from the *Constitution*.<sup>282</sup> These are important observations. Jurisdictional error is difficult to pin down. It is entirely dependent on the statutory context and, as Basten J has observed, the grounds giving rise to jurisdictional error have expanded much more than traditionally contemplated.<sup>283</sup> The grounds of review are themselves not principles of law capable of easy and consistent application.<sup>284</sup> Anchoring our understanding of the scope of the minimum provision of judicial review to jurisdictional error is problematic and raises more questions than it answers.

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above n 70, 56-74; Mark Aronson and Matthew Groves, *Judicial Review of Administrative Action* (Lawbook, 5<sup>th</sup> ed, 2013) 17-18.

<sup>277</sup> McDonald, above n 8, 18.

<sup>278</sup> *Jarrat v Commissioner of Police for New South Wales* (2005) 224 CLR 44, [24] (Gleeson CJ), [51] (McHugh, Gummow and Hayne JJ); *Annetts v McCann* (1990) 170 CLR 596, 598 (Mason CJ, Deane and McHugh JJ); *Twist v Randwick Municipal Council* (1976) 136 CLR 106, 110 (Barwick CJ).

<sup>279</sup> *Palme* (2003) 216 CLR 212, 225 [46] (Gleeson CJ, Gummow and Heydon JJ), 228 [57] (McHugh J).

<sup>280</sup> Kirk, above n 16, 70.

<sup>281</sup> McDonald, above n 8, 27.

<sup>282</sup> Ibid 18 citing Jeremy Kirk, 'Administrative Justice and the Australian Constitution' in Robyn Creyke and John McMillan (eds), *Administrative Justice - The Core and the Fringe* (Australian Institute of Administrative Law, 2000).

<sup>283</sup> Basten, above n 269, 95.

<sup>284</sup> Spigelman, above n 73, 17.

The second major difficulty associated with the jurisdictional error approach arises from the statutory context. Jurisdictional error is based on a process of statutory construction.<sup>285</sup> It is determined by reference to the statute that empowered the decision. Accordingly, classifying an error as jurisdictional is a conclusion reached by interpreting the boundaries of the decision maker's power. The result is that the legislature can circumvent the jurisdiction of the High Court by classifying requirements under the act in question as non-jurisdictional. This is the no-invalidity clause problem. The emphasis is on form, but the High Court is approaching the question as one of substance and degree.<sup>286</sup>

Will Bateman, on the scope and content of s 75(v), made the observation that if no-invalidity clauses are given full effect they will have the practical impact of 'hollowing out' the constitutional concept of jurisdictional error of any meaning.<sup>287</sup> The same argument was made by Charles Noonan.<sup>288</sup> If the legislature can confer power without jurisdictional limitations then s 75(v) is reduced to insignificance. Concern over the potential for parliament to exclude jurisdictional error by simply widening the jurisdiction of the decision maker to the nth degree was discussed in *Plaintiff S157*.<sup>289</sup> The majority indicated that giving such an open ended discretion 'might well be ineffective'.<sup>290</sup> Discretion in such broad terms would seem to lack the requisite quality of a 'law' and connection with a head of power under the *Constitution*.<sup>291</sup> The reservation to the High Court of a constitutional jurisdiction to ensure that Commonwealth officers obey the law necessarily confines the power of Parliament to avoid or confine judicial review.<sup>292</sup> The Court made it clear that efforts to circumvent s 75(v) would be ineffective.<sup>293</sup> This is not surprising, if they were effective then the accountability function of s 75(v) and its significance at giving effect to the rule of law would be insignificant.

The inquiry is thus led back to the ultimate question, what are the limits beyond which a no-invalidity clause cannot reach? These limits must exist. In *Futuris*, despite the broad ranging and explicit nature of s 175 of the Tax Act, the Court concluded that on its proper construction s 175 did not extend to

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<sup>285</sup> Leeming, above n 70, 58; Ronald Sackville, 'The constitutionalisation of State administrative law (2012) 19 *Australian Journal of Administrative Law* 127, 133 citing McDonald, above n 8, 18.

<sup>286</sup> *Graham* (2017) 91 ALJR 890, 902 [48] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ); *Bodruddaza* (2007) 228 CLR 651, 671 [53] (Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ).

<sup>287</sup> Bateman, above n 6, 502.

<sup>288</sup> Noonan, above n 8, 460 citing Bateman, above n 6, 502.

<sup>289</sup> *Plaintiff S157* (2003) 211 CLR 476, 512-13 [101]-[102] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

<sup>290</sup> *Ibid* 512 [102] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

<sup>291</sup> *Ibid* 512-13 [101]-[102] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ) citing *The Commonwealth v Grunseit* (1943) 67 CLR 58, 82 (Latham CJ).

<sup>292</sup> *Plaintiff S157* (2003) 211 CLR 476, 513-14 [104] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

<sup>293</sup> *Ibid*.

preserve decisions made in deliberate breach of the requirements under the Tax Act.<sup>294</sup> Those errors remained jurisdictional. Reliance is placed on jurisdictional error as the answer to the inquiry, but it cannot explain the Court's underlying approach to the interpretation of legislative restrictions on judicial review by itself. As a basis for determining the scope of the entrenched minimum provision of judicial review, jurisdictional error raises more questions than it answers. Jurisdictional error is, for this reason, incapable of providing a basis upon which to rationalize the High Court's understanding of s 75(v) and the entrenched minimum provision of judicial review. The significance of s 75(v) as an accountability mechanism and implementation of the rule of law in Australia, may succeed where jurisdictional error has proved inadequate.

### C      *The rule of law and section 75(v)*

Section 75(v) gives effect to the rule of law.<sup>295</sup> In *Plaintiff S157*, the majority made this point by emphasizing the role played by s 75(v) in giving textual reinforcement to what Dixon J famously said about the rule of law in *Australian Communist Party v The Commonwealth*.<sup>296</sup> That is, that the rule of law is an assumption upon which the *Constitution* is based.<sup>297</sup> In *Plaintiff S157*, the Court drew upon the place and purpose of s 75(v), to highlight the fact that the section gave expression to the rule of law in the *Constitution*. In this context, as indicated in the introduction, the rule of law refers to the requirement that all people, including government, are subject to law. The concept is often attributed to A V Dicey. Dicey observed that 'every official, from the Prime Minister down to a constable or collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen.'<sup>298</sup> The broader content of the rule of law principle is highly contested.<sup>299</sup> The High Court has

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<sup>294</sup> *Futuris* (2008) 237 CLR 146, 157 [25] (Gummow, Hayne, Heydon and Crennan JJ). As discussed in Chapter III, in *Futuris* the Court also concluded that the no-invalidity clause in s 175 of the Tax Act would not preserve 'tentative' or 'purported' assessments, but rather than relying upon *Plaintiff S157* and jurisdictional error this conclusion is based in Tax law and the firm view that an 'assessment' for tax purposes is 'definitive in character', see the majority at paragraph [50] citing *Federal Commissioner of Taxation v Hoffnung & Co Ltd* (1928) 42 CLR 39, 55 (Isaacs J); *Stokes v Federal Commissioner of Taxation* (1996) 32 ATR 500, 506 (Davies J).

<sup>295</sup> *Plaintiff S157* (2003) 211 CLR 476, 482-3 [5] (Gleeson CJ), 513 [103] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ); *Graham* (2017) 91 ALJR 890, 902 (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ); *Miah* (2001) 206 CLR 57, 121 [208] (Kirby J); see also Murray Gleeson, *The Rule of Law and the Australian Constitution* (ABC Books, 2000) 67-8.

<sup>296</sup> *Plaintiff S157* (2003) 211 CLR 476, 513 [103] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ) citing *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1, 193 (Dixon J).

<sup>297</sup> *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1, 193 (Dixon J); see also *South Australia v Totani* (2010) 242 CLR 1, 42 [61] (French CJ); *Thomas v Mowbray* (2007) 233 CLR 307, 342 [61] (Gummow and Crennan JJ); *APLA Ltd v Legal Services Commissioner* (2005) 224 CLR 322, 351 [30] (Gleeson CJ and Heydon J).

<sup>298</sup> Dicey, above n 113, 177-8.

<sup>299</sup> Leslie Green, 'The Political Content of Legal Theory' (1987) 17 *Philosophy of the Social Sciences* 1, 18.



said that it is reluctant to inform hard edged principles from such a contestable notion.<sup>300</sup> However, the Court has made it clear that principles and concepts derived from the rule of law form an assumption against which the *Constitution* must be read and applied.<sup>301</sup> The rule of law may legitimately be ‘taken into account’ when interpreting the *Constitution*.<sup>302</sup>

Justice Gaudron’s statement in *Corporation of Enfield City Council v Development Assessment Commission* (‘*Enfield City Council*’),<sup>303</sup> is a cogent articulation of the rule of law principle. Her Honour said that ‘[t]hose exercising executive and administrative powers are as much subject to the law as those who are or may be affected by the exercise of those powers.’<sup>304</sup> Judicial Review is concerned with the enforcement of this notion of the rule of law.<sup>305</sup> In *Church of Scientology v Woodward*,<sup>306</sup> Brennan J observed that.<sup>307</sup>

Judicial review is neither more nor less than the enforcement of the rule of law over executive action; it is the means by which executive action is prevented from exceeding the powers and functions assigned to the executive by law and the interests of the individual are protected accordingly.

Judicial review ensures that decisions are taken within the power conferred.<sup>308</sup> This is the enforcement of the rule of law, to which s 75(v) gives effect by ensuring that the High Court has original jurisdiction to issue the constitutional writs.

The possibility that the rule of law could provide guidance to understanding the scope of the entrenched minimum provision of judicial review has been advanced by some commentators.<sup>309</sup> As Jeremy Kirk correctly observes, the statement by the majority in *Plaintiff S157* that ‘[s 75(v)] is a means of ensuring to all people affected that officers of the Commonwealth obey the law and neither exceed nor neglect

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<sup>300</sup> *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1, 23 (McHugh and Gummow JJ); see generally, Matthew Groves, ‘Judicial Review of Administrative Action in the High Court of Australia’ (2008) 33 *Queen’s Law Journal* 327; Peter Cane and Leighton McDonald, *Principles of Administrative Law: Legal Regulation of Governance* (Oxford university Press, 2008) 48-51.

<sup>301</sup> *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1, 193 (Dixon J).

<sup>302</sup> *Theophanous v Herald and Weekly Times Ltd* (1994) 182 CLR 104, 196 (McHugh J); Duncan Kerr and George Williams, ‘Review of executive action and the rule of law under the Australian Constitution’ (2003) 14 *Public Law Review* 219, 228.

<sup>303</sup> (2000) 199 CLR 135.

<sup>304</sup> *Ibid* 157 [56] (Gaudron J).

<sup>305</sup> *Church of Scientology v Woodward* (1982) 154 CLR 25, 70 (Brennan J).

<sup>306</sup> *Ibid*.

<sup>307</sup> *Ibid*.

<sup>308</sup> *Probuild* (2018) 92 ALJR 248, 266-7 [72] (Gageler J); *Corporation of Enfield City Council v Development Assessment Commission* (2000) 199 CLR 135 [43] (Gleeson CJ, Gummow, Kirby and Hayne JJ) citing *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 35-36 (Brennan J).

<sup>309</sup> See, eg, Kirk, above n 16, 69-72; McDonald, above n 8, 25-31; Bateman, above n 6, 478-9.

their jurisdiction which the law confers upon them<sup>310</sup> is a statement about the principle of legality. Kirk understands the principle of legality to be the principle enunciated by Gaudron J, outlined above.<sup>311</sup> In *Plaintiff S157*, the High Court tied this principle directly to s 75(v) and the entrenched minimum provision of judicial review.

Even without constitutional considerations, supervisory jurisdiction was a characteristic of superior courts. A privative clause has always had only limited success in inhibiting that jurisdiction.<sup>312</sup> It is essential, according to Kirby J, that courts retain their jurisdiction to review for breaches of ‘fundamental requirements’ because the rule of law:<sup>313</sup>

[I]mposes ultimate limits on the power of any legislature to render government action, federal, state or territory, immune from conformity to the law and scrutiny by the courts against that basal standard.

A similar point was made by the Court in *Plaintiff S157*,<sup>314</sup> and again in *Graham*.<sup>315</sup> Section 75(v) secures this most basic element of the rule of law in the *Constitution*.<sup>316</sup> The purpose of s 75(v) is to assure to all people affected that officers of the Commonwealth obey the law and neither exceed nor neglect the jurisdiction conferred upon them.<sup>317</sup> Once the centrality of the rule of law to s 75(v) jurisprudence is fully appreciated it provides a backdrop from which to draw out the principles that inform the High Court’s approach to legislative restrictions on judicial review.

It is important to note, however, that the rule of law itself is insufficient to provide the basis upon which to draw an understanding of the scope of the minimum provision of judicial review. The rule of law provides an incomplete picture. The enforcement of the law is the rationale for correcting jurisdictional error.<sup>318</sup> The inquiry ultimately leads back to the concept of jurisdictional error and is vulnerable to the criticisms highlighted Part B above. The reasoning is circular in the sense that it does not provide the

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<sup>310</sup> Kirk, above n 16, 69 citing *Plaintiff S157* (2003) 211 CLR 476, 513-4 [104] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

<sup>311</sup> Kirk, above n 16, 69.

<sup>312</sup> See, eg, *Willan* [1874] UKPC 28; *Anisminic* [1969] AC 147.

<sup>313</sup> *Fish v South 6 Holdings Ltd* (2006) 225 CLR 180, 223-4 [146] (Kirby J).

<sup>314</sup> *Plaintiff S157* (2003) 211 CLR 476, 482-3 [5] (Gleeson CJ), 512-13 [103]-[104] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

<sup>315</sup> *Graham* (2017) 91 ALJR 890, 902 [44] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).

<sup>316</sup> *Ibid.*

<sup>317</sup> *Plaintiff S157* (2003) 211 CLR 476, 482-3 [5] (Gleeson CJ), 512-13 [103]-[104] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

<sup>318</sup> *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597, 614-15 (Gaudron and Gummow JJ)

broad understanding of s 75(v)'s function that enables the scope of the entrenched minimum provision of judicial review to be understood.

The High Court's approach to determining when there has been an intrusion upon the minimum provision of judicial review cannot be explained by the rule of law alone because the emphasis would be too heavily on form. In *Bodruddaza*, the Court indicated that it would invalidate or 'read-down' a no-invalidity clause that authorised the fraudulent or deliberate breach of legislative requirements.<sup>319</sup> As discussed above, in *Futuris*, the Court interpreted s 175 of the Tax Act, as broad as it was, to still not extend to fraud or deliberate maladministration.<sup>320</sup> The High Court is informing its understanding of s 75(v) and the entrenched minimum provision of judicial review by reference to something other than simply the requirement that government is subject to the law. It is insufficient as a single principle to explain the Court's approach to the entrenched minimum provision of judicial review. However, the rule of law rationale as the key purpose of s 75(v) can provide the much-needed substance to explain the Court's rationale, if it is understood in concert with a broader approach to administrative accountability.

#### D *Consideration of the broader context of administrative accountability*

The role of judicial review is to restrain administrative decision makers from arbitrary or unlimited exercises of power. The High Court has indicated that it will invalidate or 'read-down' legislative provisions that are inconsistent with the place and purpose of s 75(v) in the constitutional structure.<sup>321</sup> The place and purpose of s 75(v) is informed by the underlying rationale of administrative accountability and need to protect people from arbitrary, or unconstrained power.

##### 1 *A broader approach to administrative accountability*

The rule of law is under threat, in this context, when there is no way of enforcing the limits on the exercise of executive power. There is no strict 'right' to judicial review, the role of judicial review is only to ensure the exercise of power is taken in accordance with the law so enacted.<sup>322</sup> Parliament determines the limits of the law to be applied and the High Court enforces those limits in accordance with the expressed intention of Parliament. In this way, judicial review is not necessarily concerned

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<sup>319</sup> *Bodruddaza* (2007) 228 CLR 651, 663 [28] (Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ).

<sup>320</sup> *Futuris* (2008) 237 CLR 146, 157 [25] (Gummow, Hayne, Heydon and Crennan JJ).

<sup>321</sup> *Bodruddaza* (2007) 228 CLR 651, 671 [53] (Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ); *Plaintiff S157* (2003) 211 CLR 476, 482-3 [5]-[6] (Gleeson CJ); see generally *Graham* (2017) 91 ALJR 890.

<sup>322</sup> *Miah* (2001) 206 CLR 57, 74-75 [52] (Gleeson CJ and Hayne J) citing *Annetts v McCann* (1990) 170 CLR 596, 604 (Brennan J).

with the protection of individual rights. In *Attorney-General (NSW) v Quin*,<sup>323</sup> Brennan J said that the ‘scope of judicial review should be defined not in terms of the protection of individual interests but in terms of the extent of power and the legality of its exercise.’<sup>324</sup> Judicial review serves to protect the individual against exercises of power outside the limits set by Parliament.

In *Kirk*, the majority placed emphasis on the need to avoid ‘islands of power’ immune from supervision and restraint.<sup>325</sup> A similar point was made by Heydon J,<sup>326</sup> and both were in the context of the need to avoid the potential for ‘distorted’ positions.<sup>327</sup> These distorted positions are positions adopted by tribunals or quasi-judicial entities that are preoccupied with correcting particular mischief.<sup>328</sup> Specialised tribunals without judicial oversight are, as Heydon J observed in reliance upon Louis Jaffe, likely to find that mischief.<sup>329</sup> Accordingly, the removal of supervision by superior courts is liable to encourage the development of distorted positions and the arbitrary exercise of power.<sup>330</sup> On the scope of s 75(v), Will Bateman referred to the need to avoid ‘unlimited’ or ‘arbitrary’ exercises of power.<sup>331</sup> Unrestrained power and the potential for arbitrariness were also described as giving rise to ‘islands of power’ in *Probuild*.<sup>332</sup>

The creation of pockets of unsupervised power provides a gateway to the exercise of arbitrary, and ultimately dictatorial power.<sup>333</sup> The need for supervision in the maintenance of the rule of law is central to the accountability function of s 75(v). It is in this context that the centrality and importance of jurisdictional error becomes clear. There is a difference between jurisdictional and non-jurisdictional errors of law in that, if not subject to review, the former reflect the exercise of arbitrary power but the latter do not.<sup>334</sup> The supremacy of the rule of law is designed to exclude the existence of arbitrariness

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<sup>323</sup> (1990) 170 CLR 1.

<sup>324</sup> *Ibid*, 36 (Brennan J).

<sup>325</sup> *Kirk* (2010) 239 CLR 531, 581 [99] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

<sup>326</sup> *Ibid*, 589 [122] (Heydon J).

<sup>327</sup> *Ibid*, 570 [64], 581 [99] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ), 589-90 [122] (Heydon J) citing Louis Jaffe, ‘Judicial Review: Constitutional and Jurisdictional Fact’ (1957) 70 *Harvard Law Review* 953, 963.

<sup>328</sup> *Kirk* (2010) 239 CLR 531, 570 [64] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

<sup>329</sup> *Ibid*, 589-90 [122] (Heydon J).

<sup>330</sup> *Ibid*, 570 [64], 581 [99] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ), 589-90 [122] (Heydon J).

<sup>331</sup> Bateman, above n 6, 478.

<sup>332</sup> *Probuild* (2018) 92 ALJR 248, 269-7 [86]-[87] (Edelman J).

<sup>333</sup> William Wade, ‘Constitutional and Administrative Aspects of the Anisminic Case’ (1969) 85 *Law Quarterly Review* 198, 200.

<sup>334</sup> *Probuild* (2018) 92 ALJR 248, 270 [87] (Edelman J).

or prerogative.<sup>335</sup> Precluding the review of a non-jurisdictional error of law prevents the assessment of whether the decision was ‘regular and according to law’.<sup>336</sup> Review in a case of non-jurisdictional error of law is a review of the legality of the process of exercising power, rather than reviewing whether the authority to exercise the power exists.<sup>337</sup> Non-jurisdictional error of law is an error of law within the confines of the power conferred upon the decision maker. The alternative, exercise of power outside the law as set down by the legislature, is an exercise of arbitrary power and accordingly, a jurisdictional error.<sup>338</sup> It is this distinction that gives rise to the increased need for the availability of review for decisions that are the subject of jurisdictional error. The absence of the ability to review decisions for jurisdictional error is inconsistent with the rule of law in the context of administrative accountability because an ‘island of power’ is created.<sup>339</sup>

Notably, however, judicial review is not the only means of ensuring that decision makers exercise their jurisdiction within the limits of the power conferred. The constitutional jurisdiction does not exist for the purpose of enabling the judiciary to impose upon the executive branch of government its idea of good administration.<sup>340</sup> The rule of law is not undermined by the mere limitation of appeals or judicial review. Appeals are frequently limited and/or confined, often limited by particular criteria because there are good policy reasons to encourage finality.<sup>341</sup> Accordingly, the very fact that a no-invalidity clause indirectly prevents access to judicial review is not, of itself, offensive to the rule of law. The concern arises in circumstances where there are inadequate means of enforcing the limits of the jurisdiction conferred upon the decision maker in general.

Section 75(v) gives effect to the rule of law, which can be understood to be the requirement that government must act according to law. This idea, considered in concert with the broader context of administrative accountability, can provide a normative basis within which to ground an understanding of the High Court’s approach to no-invalidity clauses. Ultimately, the approach hinges on the alternative arrangements for ensuring oversight of administrative decision making. The place and purpose of s 75(v) will only be interfered with when there are inadequate means of ensuring that islands of power are not created by decision makers. This will not occur where there are alternative mechanisms in place

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<sup>335</sup> Dicey, above n 113, 202.

<sup>336</sup> *Probuild* (2018) 92 ALJR 248, 270 [87] (Edelman J) citing *R v Bolton* (1841) 1 QB 66, 72 (Denman LCJ).

<sup>337</sup> *Ibid*.

<sup>338</sup> *Ibid*; *Kirk* (2010) 239 CLR 531, 581[99]-[100] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

<sup>339</sup> *Probuild* (2018) 92 ALJR 248, 269-70 [86]-[87] (Edelman J).

<sup>340</sup> *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1, 11-12 [32] (Gleeson CJ).

<sup>341</sup> *Public Service Association of South Australia v Federated Clerks Union of Australia, South Australia Branch* (1991) 173 CLR 132, 147-8 (Deane J); *Baxter v New South Wales Clickers’ Association* (1909) 10 CLR 114, 161 (Isaacs J).

to allow for review. For example, a piece of legislation might provide for extensive avenues of appeal and review in its own right,. Alternatively, if particular grounds of review are excluded then jurisdictional error is liable to be identified on other grounds. It may also be the case that certain requirements under this hypothetical act, are designated as not being ‘mandatory’ or ‘essential’ to the validity of a decision, this does not preclude review of other requirements or on other grounds.

In *Plaintiff M61*, there was no question of the place and purpose of s 75(v) being under threat because the choice to exercise the power was at the Minister’s discretion. If the power was exercised there were oversight mechanisms in place, including judicial review, to ensure it was exercised within the limits conferred by Parliament.<sup>342</sup> No issue of arbitrary power arose in *Plaintiff M61*. In contrast, in *Bodrudazza* no real mechanism for review existed once the impracticably short timeframe to seek judicial review had elapsed. Accordingly, the imposition of such a short time frame within which to apply for judicial review subverted the purpose of the remedies provided by s 75(v).<sup>343</sup> Without it, there was no mechanism to ensure the decisions of the Refugee Review Tribunal were taken within the power conferred.

Like privative clauses, the effect of a no-invalidity clause will always be a question of statutory construction.<sup>344</sup> The meaning given to a no-invalidity clause will reflect the context in which it is found.<sup>345</sup> Additionally, construing a no-invalidity clause in Federal legislation must be done subject to the *Constitution*<sup>346</sup> and will involve an application of all relevant principles of statutory construction.<sup>347</sup> Two key principles that must be considered are the presumption of legality and the aforementioned need to avoid arbitrary exercises of power. The outcome is the presumption that the Court will not read into legislation, in the absence of clear words to the contrary, an intention to abrogate fundamental

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<sup>342</sup> *Plaintiff M61* (2010) 243 CLR 316, 347 [59] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).

<sup>343</sup> *Bodrudazza* (2007) 228 CLR 651, 672 [58]-[60] (Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ).

<sup>344</sup> *Futuris* (2008) 237 CLR 146, 156 [23] (Gummow, Hayne, Heydon and Crennan JJ) citing *Project Blue Sky* (1998) 194 CLR 355, 390-1 (McHugh, Gummow, Kirby and Hayne JJ); *Palme* (2003) 216 CLR 212, 225 [44] (Gleeson CJ, Gummow and Heydon JJ); see also *Plaintiff S157* (2003) 211 CLR 476, 493 [33] (Gleeson CJ); 502-3 [64]-[66] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

<sup>345</sup> *Probuild* (2018) 92 ALJR 248, 258 [34] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ); *Plaintiff S157* (2003) 211 CLR 476, 492 [28] (Gleeson CJ); 505 [71]-[73] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ); *Richard Walter* (1995) 183 CLR 168, 209 (Deane and Gaudron JJ); see also *Project Blue Sky* (1998) 194 CLR 355, [69] (McHugh, Gummow, Kirby and Hayne JJ).

<sup>346</sup> *Plaintiff S157* (2003) 211 CLR 476, 492-3 504-5 [71] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ)

<sup>347</sup> *Ibid* 490-1 [26] (Gleeson CJ); 504-5 [71]-[72] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

rights of preclude access to the courts to correct legal errors.<sup>348</sup> This approach is fully explored in the next chapter.

Ultimately, if adequate means of oversight exist, there will be no intrusion on the entrenched minimum provision of judicial review by even a broadly cast no-invalidity clause. In such a case, the no-invalidity clause will be effective at indirectly preventing judicial review by bringing certain breaches of legislative requirements within jurisdiction. No intrusion upon the entrenched minimum provision of judicial review will occur in form or in substance, because there is no interference with the place and purpose of s 75(v) in the *Constitution*. A person aggrieved by the decision can seek appeal or review in accordance with the alternative appeal procedures provided for in the legislation.

On the other hand, in circumstances where there are no adequate alternative avenues of review or appeal, the no-invalidity clause must be read subject to the entrenched minimum provision of judicial review. The minimum content of judicial review cannot be abrogated in substance, so the no-invalidity clause is ineffective to the extent that it does so. No-invalidity clauses, like privative clauses, should be read consistently with the *Constitution* if such an interpretation is available.<sup>349</sup> For this reason they are liable to be interpreted differently depending on the context in which they appear. If there are no means of otherwise ensuring administrative accountability, preserving the place and purpose of s 75(v) will necessitate a narrow reading of the no-invalidity clause. Generally, this circumstance is only likely to arise in the context of a broad no-invalidity clause. This will be fully explored in chapter V. However, before moving on it is important to consider the limitations of the approach advanced in this chapter.

## 2 Limitations to relying upon the broader context of administrative accountability

The major shortcoming of the approach advanced in this chapter is that it cannot provide a methodical, principled approach to outlining the scope of the minimum provision of judicial review in s 75(v). The only way this could be achieved would be for the High Court to adopt a conception of the rule of law from which it could develop substantive principles of interpretation. This has significant difficulties because of the extent to which the rule of law is disputed beyond the base requirement of adherence to the law. Indeed, the Court has indicated an intention to avoid such treacherous waters.<sup>350</sup> The High

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<sup>348</sup> Ibid 492-3 [30]-[33] (Gleeson CJ); 504-5 [71]-[72] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ); *Probuild* (2018) 92 ALJR 248, 270 [87] (Edelman J); *Electrolux Home products Pty Ltd v Australian Worker's Union* (2004) 221 CLR 309, 329 [21] (Gleeson CJ); *Lee v NSW Crime Commission* (2013) 251 CLR 196, [171] (Kiefel J), [307]-[308] (Gageler and Keane JJ).

<sup>349</sup> *Acts Interpretation Act 1901* (Cth) s 15A; see also *Plaintiff S157* (2003) 211 CLR 476, 492-3 504-5 [71] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ); *Attorney-General (Vic) v The Commonwealth* (1945), 71 CLR 237, 267 (Dixon J); *Monis v The Queen* (2013) 249 CLR, 92, 208 [327], [329] (Crennan, Kiefel and Bell JJ).

<sup>350</sup> *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1, 23 (McHugh and Gummow JJ).

Court is informing its understanding of s 75(v) and the entrenched minimum provision of judicial review by reference to the accountability function of s 75(v). There is difficulty associated with ascertaining the point at which there are inadequate alternative arrangements for the maintenance of accountability. This is a case by case question and will depend on the context in which the legislative restriction on judicial review appears.

The process is ultimately one of statutory construction. It involves an application of key principles such as the presumption of legality and the need, where inconsistencies exist, for reconciliation. This will be properly explored in Chapter V. This does not involve the application of new principles, it involves applying principles of construction that judges have been applying for centuries. Judges consider, under the approach advanced in this thesis, the broader context of administrative accountability and make the judgment of whether the values associated with the rule of law are under threat. The result is an approach that does not provide absolute clarity as to the delineation of the boundaries of the minimum provision of judicial review. However, it can provide the explanation for how the High Court has approached the question of whether a legislative restriction on judicial review has, in substance, intruded upon its bounds.

## F *Concluding Remarks*

This chapter has demonstrated that the rule of law, in concert with a broader approach to administrative accountability, is capable of offering a foundation for understanding the High Court's approach to the scope of the minimum provision of judicial review. In the following chapter, Chapter V, the manner in which this will impact the construction of no-invalidity clauses will be explored. This will provide a more complete picture. In essence, the scope of the entrenched minimum provision of judicial review extends to requiring that there will always be means of enforcing the limitations on a decision maker's power. Those means need not be judicial review. The place and purpose of s 75(v) will only be impeded in substance where there are inadequate means of ensuring that an administrative decision maker takes their decision within the bounds of the jurisdiction conferred upon them.



## V. AVOIDING ISLANDS OF POWER CREATED BY NO-INVALIDITY CLAUSES

### A Introduction

Whether or not an administrative decision is valid will depend on whether the exercise of power falls within the bounds of the jurisdiction conferred. A no-invalidity clause forms part of that assessment. If it is accepted that the rule of law, in concert with a broader approach to administrative accountability can inform the scope of the minimum provision of judicial review, an approach to no-invalidity clauses that is consistent with s 75(v) can be identified. In circumstances where a no-invalidity clause operates to undermine the place and purpose of s 75(v) the Court should, relying on established principles of statutory construction, apply a more restrictive interpretation to the clause. The presumption of legality has played a significant role in the interpretation of legislative restrictions on judicial review. This has been the case whether those restrictions were in form or in substance, and whether the errors purported to be protected were jurisdictional or not.<sup>351</sup> The presumption of legality has informed what Edelman J described as the ‘narrow approach to construction’.<sup>352</sup> By no means is this a new concept, but this language is being adopted for its clarity and simplicity. The application of this approach to privative clauses is well known. It is submitted that it can have a similar application to the interpretation of no-invalidity clauses.

The validity of decisions that are subject to no-invalidity clauses are to be approached with an application of the *Project Blue Sky* test for validity.<sup>353</sup> The High Court in *Futuris* specifically excluded any application of the Hickman Provisos on the basis that no prima facie inconsistency between the clause and the legislation could be identified.<sup>354</sup> Therefore, there was no need to consider the approach taken in *Plaintiff S157*. The question was whether it was a ‘purpose’ of the legislation that the decision was to be rendered invalid because of a breach of a legislative requirement. The majority of the High Court in *Futuris* that arrived at this conclusion should be understood to have applied the correct approach. However, a prima facie inconsistency can be said to arise if legislation contains a broad no-invalidity clause, of the kind in *Futuris*, and no alternative mechanism of appeal or review. In such circumstances, the narrow approach to construction should apply with significant force. The narrow approach to construction has been a ‘working hypothesis’ of legislative restrictions on judicial

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<sup>351</sup> *Probuild* (2018) 92 ALJR 248, 269 [85] (Edelman J).

<sup>352</sup> Ibid 269 [85] (Edelman J): ‘narrow approach to construction’ is the phrase given to the judicial approach to privative clauses by Edelman J, it offers simplicity and clarity in application.

<sup>353</sup> See discussion in Chapter II, Part C.3.

<sup>354</sup> *Futuris* (2008) 237 CLR 146, 167 [67] (Gummow, Hayne, Heydon and Crennan JJ).

review.<sup>355</sup> The narrow approach to construction is a result of the need for parliament to express in clear words its intention to preclude access to a court to correct errors of law. It is a principle that is the culmination of both the presumption of legality and the rule of law's repugnance to arbitrary and unconstrained exercise of power. This chapter will demonstrate that in circumstances where the place and purpose of s 75(v) is under threat by a broad no-invalidity clause, the narrow approach to the construction of the no-invalidity clause is open to the Court.

## B *The narrow approach to construction*

The narrow approach to the construction of privative clauses involves prescribing a meaning to the clause that is much narrower than its literal meaning, in order to reconcile an inconsistency with the rest of the legislation.<sup>356</sup> There have been occasions where privative clauses have been construed so narrowly that the clause is left with little practical effect.<sup>357</sup> This has been the case even where this conflicts with the actual expressed intention of parliament. For example, s 474 of the Migration Act in *Plaintiff S157* was construed so narrowly as to be left with virtually no work to do.<sup>358</sup> This was despite a clear indication from parliament that s 474 was designed to preclude judicial review as long as the decision maker adhered to the Hickman Provisos.<sup>359</sup> Mark Aronson described s 474 as having been 'filleted'.<sup>360</sup>

The rationale for the narrow approach to construction is intimately connected to the rule of law and the presumption of legality.<sup>361</sup> The presumption of legality is the presumption that parliament does not intend to limit or revoke fundamental principles, infringe rights, or depart from the general system of

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<sup>355</sup> *Electrolux Home products Pty Ltd v Australian Worker's Union* (2004) 221 CLR 309, 329 [21] (Gleeson CJ).

<sup>356</sup> This approach should be recognisable as the manner in which courts have wrestled with privative clauses for years. The aim is to construe the clause consistently with the broader legislation, this involves applying a narrow construction. See chapter II, Part B for analysis of privative clauses generally. See, eg, *Plaintiff S157* (2003) 211 CLR 476, 504-5 [71]-[72] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ); *Public Service Association (SA)* (1991) 173 CLR 132, 160 (Dawson and Gaudron JJ); *Darlington Casino* (1997) 191 CLR 633-635 (Gaudron and Gummow JJ); *Hickman* (1945) 70 CLR 598, 615-16 (Dixon J); *R v Murray*; *Ex parte Proctor* (1949) 77 CLR 387, 400 (Dixon J).

<sup>357</sup> *Probuild* (2018) 92 ALJR 248, 269 [84] (Edelman J).

<sup>358</sup> Ronald Sackville, 'The 2003 Term: The Inaccessible Constitution' (2004) 27 *University of New South Wales Law Journal* 66, 70; Mark Aronson, 'Commentary on "The entrenched minimum provision of judicial review and the rule of law"' (2010) 21 *Public Law Review* 35, 36

<sup>359</sup> Commonwealth, Parliamentary Debates, House of Representatives, 26 September 2001, 31559 – 61 (Phillip Ruddock).

<sup>360</sup> Mark Aronson, 'Commentary on "The entrenched minimum provision of judicial review and the rule of law"' by Leighton McDonald' (2010) 21 *Public Law Review* 35, 36

<sup>361</sup> The presumption of legality is not to be confused with the principle of legality referred to earlier in the context of Jeremy Kirk's work. The two are intimately related, but they are different.

law, without expressing its intention with irresistible clearness.<sup>362</sup> The presumption of legality has been cited and applied repeatedly by the High Court as a fundamental principle of statutory interpretation.<sup>363</sup> It has become a ‘working hypothesis’ upon which statutory language is drafted and interpreted.<sup>364</sup>

The presumption has informed the interpretation of privative clauses and other legislative restrictions on judicial review, in one way or another, for centuries.<sup>365</sup> It arises out of the complex interaction between the judiciary and the legislature. The supremacy of parliament must be respected, but the courts will not readily imply an intention to remove fundamental common law rights into the legislation without absolute clarity. The outcome is the need for parliament to be clear in its intention to revoke those rights. In this way, the presumption also operates to force parliament to squarely confront the consequences of its actions in infringing a person’s common law rights.<sup>366</sup>

The need to avoid the exercise of unlimited or arbitrary exercises of power, the same rationale that underpins the accountability function of s 75(v), also underwrites the narrow approach to construction.<sup>367</sup> In *Kirk v Industrial Court of NSW*,<sup>368</sup> the majority made the observation that if privative clauses were interpreted literally and precluded State Supreme Courts from issuing relief where decisions were tainted by jurisdictional error, the effect would be to create ‘islands of power’ immune from supervision and restraint.<sup>369</sup> The provision would effectively allow a decision maker to act unrestrained. The same rationale is applicable to the High Court’s jurisdiction under s 75(v).<sup>370</sup>

The specific application of the presumption of legality and the fact that the *Australian Constitution* is framed upon an assumption of the rule of law, results in a narrow approach to the construction of privative clauses. They are construed by reference to the assumption that parliament does not intend to

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<sup>362</sup> *Coco v The Queen* (1994) 179 CLR 427, 437-8 (Mason CJ, Brennan, Gaudron and McHugh JJ); *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252, 271 [58] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ); *Plaintiff M47/2012 v Director General of Security* (2012) 251 CLR 1, 60-1 [119] (Gummow J).

<sup>363</sup> *Lee v NSW Crime Commission* (2013) 251 CLR 196 [171] (Kiefel J).

<sup>364</sup> *Probuild* (2018) 92 ALJR 248, 269 [84] (Edelman J); *Electrolux Home products Pty Ltd v Australian Worker’s Union* (2004) 221 CLR 309, 329 [21] (Gleeson CJ).

<sup>365</sup> *Probuild* (2018) 92 ALJR 248, 269 [85] (Edelman J); see, eg, *R v Jukes* (1800) 8 TR 542; *R v Moreley* (1760) 2 Burr. 1040; *R v Plowright* (1685) 3 Mod. 94.

<sup>366</sup> *R v Secretary of State for the Home Department; Ex parte Simms* [2000] 2 AC 115, 131 (Lord Hoffman); *Coco v The Queen* (1994) 179 CLR 427, 437-8 (Mason CJ, Brennan, Gaudron and McHugh JJ); *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543, 582 [106] (Kirby J).

<sup>367</sup> *Probuild* (2018) 92 ALJR 248, 269-70 [86] (Edelman J); *Plaintiff S157* (2003) 211 CLR 476, 492 [31] (Gleeson CJ).

<sup>368</sup> (2010) 239 CLR 531.

<sup>369</sup> *Ibid* 581 [99] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

<sup>370</sup> *Plaintiff S157* (2003) 211 CLR 476, 513-14 [104] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ); Bateman, above n 6, 477.

deprive an aggrieved person of access to the courts, other than by express terms or necessary implication.<sup>371</sup> Chief Justice Gleeson made this clear in *Plaintiff S157*.<sup>372</sup> His Honour observed that all relevant principles of statutory interpretation were applicable; amongst the principles of statutory construction, reliance should be placed on the presumption of legality and the relevance of the need to ensure administrative decisions are taken in accordance with the jurisdiction conferred.<sup>373</sup> This culminates in the presumption that the legislature does not intend to deprive the citizen of access to the courts, other than to the extent expressly stated or necessarily implied.<sup>374</sup>

This narrow approach to the construction of legislative restrictions on judicial review should also be understood to be variable.<sup>375</sup> The extent to which it applies will depend on the legislative context in question.<sup>376</sup> In circumstances where the decision maker is concerned with the final adjudication of rights the rationale underpinning the narrow approach to construction warrants its application with greater force. Likewise, if the legislation contemplates extensive appeal and review there is much less call for the application of the principle.<sup>377</sup> This is because there is less concern about the exercise of arbitrary power that could significantly undermine a person's individual rights. Finally, the presumption of legality also comprises an element of reading statutory provisions in a manner consistent with the *Constitution*, a central principle applicable to privative clauses as explained above.<sup>378</sup> In circumstances where no alternative means of appeal and review are available, a prima facie inconsistency between the clause and the legislation, similar to a privative clause, arises. This will be fully explored in the next part of this chapter. It will be demonstrated that when the inconsistency arises, the rationale for the narrow approach to construction applies with force allowing the High Court to adopt a narrowing reading of the no-invalidity clause in order to construe it consistently with the *Constitution*.

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<sup>371</sup> *Probuild* (2018) 92 ALJR 248, 270 [86] (Edelman J); *Plaintiff S157* (2003) 211 CLR 476, 492 [32] (Gleeson CJ); *Public Service Association (SA) v Federated Clerks' Union* (1991) 173 CLR 132, 160 (Dawson and Gaudron JJ).

<sup>372</sup> *Plaintiff S157* (2003) 211 CLR 476, 492 [32] (Gleeson CJ).

<sup>373</sup> *Ibid.*

<sup>374</sup> *Probuild* (2018) 92 ALJR 248, 270 [86] (Edelman J); *Plaintiff S157* (2003) 211 CLR 476, 492 [32] (Gleeson CJ); *Public Service Association (SA) v Federated Clerks' Union* (1991) 173 CLR 132, 160 (Dawson and Gaudron JJ).

<sup>375</sup> *Probuild* (2018) 92 ALJR 248, 270 [86] (Edelman J) citing *R v Investigatory Powers Tribunal* [2017] EWCA 1868, [25] (Sales LJ, with Flaux and Floyd LJJ agreeing).

<sup>376</sup> *Probuild* (2018) 92 ALJR 248, 258 [34] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ); *Plaintiff S157* (2003) 211 CLR 476, 492 [28] (Gleeson CJ); 505 [71]-[73] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ); *Richard Walter* (1995) 183 CLR 168, 209 (Deane and Gaudron JJ).

<sup>377</sup> *Probuild* (2018) 92 ALJR 248, 258-60 [36]-[40] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ), 275-6 [107]-[109] (Edelman J).

<sup>378</sup> *Attorney-General (Vic) v The Commonwealth* (1945) 71 CLR 237, 267 (Dixon J); *Morris v The Queen* (2013) 249 CLR 92, 208 [327], [329] (Crennan, Kiefel and Bell JJ); *Plaintiff S157* (2003) 211 CLR 476 [71] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

### C *Broad no-invalidity clauses, prima facie inconsistency and narrow construction*

In *Futuris*, reliance by the majority was placed on Dawson J's statement in *Richard Walter* that no inconsistency arose between s 175 and the other provisions of the Tax Act.<sup>379</sup> In the case of privative clauses, as has been explained above, there is a need for the reconciliation of the prima facie inconsistency between the privative clause and the jurisdictional limitations imposed by the act in question.<sup>380</sup> The inconsistency is said to arise because of the grant of limited jurisdiction and the existence of a clause that purports to remove the power of the Court to enforce those limits.<sup>381</sup> However, as Will Bateman observes, this inconsistency is not a strict antinomy.<sup>382</sup> There is a distinction to be drawn between the outlining of jurisdictional limitations dealing with substantive law and a clause targeting the jurisdiction of a court to conduct judicial review of the decision.<sup>383</sup>

The inconsistency that exists is actually more complex. In *Kirk*, the High Court said that the reconciliation process was more than resolving an apparent inconsistency between the privative clause and the jurisdictional limitations imposed by the act.<sup>384</sup> There is, in fact, a contradiction between the privative clause and the rule of law.<sup>385</sup> The rule of law, to which s 75(v) gives effect, requires that government be subject to the law. The High Court is the ultimate arbiter of whether administrative action has been taken within the limits of the jurisdiction conferred. The privative clause, if given its literal meaning, prevents the Court from exercising its supervisory jurisdiction and ensuring administrative decision makers remain within the bounds of the jurisdiction conferred. The exercise of administrative power would then be liable to arbitrary and unconstrained exercise. A position that is incompatible with the rule of law and s 75(v). The High Court's repugnance towards privative clauses is best understood in this context.<sup>386</sup>

Of course, if a privative clause is read according to its literal meaning it is expressly inconsistent with s 75(v).<sup>387</sup> It has long been established that privative clauses are to be given a meaning consistent with

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<sup>379</sup> *Futuris* (2008) 237 CLR 146, 167 [67] (Gummow, Hayne, Heydon and Crennan JJ).

<sup>380</sup> See discussion in Chapter II, Part B.

<sup>381</sup> See discussion in Chapter II, Part B.

<sup>382</sup> Bateman, above n 6, 478

<sup>383</sup> See generally *Parisiennne Basket Shoes Pty Ltd v Whyte* (1938) 59 CLR 369, 389 (Dixon J).

<sup>384</sup> *Kirk* (2010) 239 CLR 531, 579-80 [94]-[95] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

<sup>385</sup> *Kirk* (2010) 239 CLR 531, 579-80 [94]-[95] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); *Plaintiff S157* (2003) 211 CLR 476, 506 [76] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ); Aronson, above n 14, 37; Bateman, above n 6, 478.

<sup>386</sup> Aronson, above n 14, 37.

<sup>387</sup> *Plaintiff S157* (2003) 211 CLR 476 [4] (Gleeson CJ) [52]-[53] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

the *Constitution*.<sup>388</sup> However, as previously explained, it has long been established that privative clauses are to be given a meaning consistent with the *Constitution*. The result is that the narrow approach to construction provides the basis for remedying the prima facie inconsistency between the privative clause and the rule of law. Accordingly, the privative clause is read as applying only to non-jurisdictional errors of law.<sup>389</sup> As noted above, a non-jurisdictional error of law is not an arbitrary or unconstrained exercise of power. If the protection of the privative clause does not extend to jurisdictional error the inconsistency with the rule of law ceases. The privative clause then operates in a manner consistent with the place and purpose of s 75(v) in the *Constitution*.

The problem with no-invalidity clauses is that the Court's jurisdiction to conduct judicial review is not, technically, subject to any restriction.<sup>390</sup> However, the question is one of substance and degree, as explained in Chapter III. Interference with the minimum provision of judicial review is to be assessed in the broader context of administrative accountability. On that basis, where the decision is concerned with the final adjudication of rights because there is no alternative provision for appeal or review, a broad no-invalidity clause will operate to preclude any administrative accountability. It will then be prima facie inconsistent with the grant of limited jurisdiction and the rule of law. A narrowly cast no-invalidity clause does not pose this problem. As was observed in *Palme*, judicial review for jurisdictional error is available on grounds otherwise arising.<sup>391</sup> On this point, in *Graham*, the majority said the following:<sup>392</sup>

Where Parliament enacts a law which confers a decision-making power on an officer and goes on to enact some other provision, not cast as a privative clause, that other provision must likewise be invalid if and to the extent that it has the legal or practical operation of denying to a court exercising jurisdiction under, or derived from, s 75(v) the ability to enforce the limits which parliament has expressly or impliedly set on the decision-making power which Parliament has conferred on the officer.

Broadly cast no-invalidity clauses, where there are no other means of ensuring administrative accountability, present an inconsistency with the grant of limited jurisdiction and the rule of law. They are for this reason, inconsistent with the entrenched minimum provision of judicial review in s 75(v).

The approach advanced in this chapter is consistent with the Court's decision in *Futuris*. In *Futuris*, the majority made the observation that no inconsistency arose in the context of s 175 of the Tax Act because

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<sup>388</sup> *Plaintiff S157* (2003) 211 CLR 476, 492-3 504-5 [71] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ); see also *Acts Interpretation Act 1901* (Cth) s 15A; *Attorney-General (Vic) v The Commonwealth* (1945), 71 CLR 237, 267 (Dixon J); *Monis v The Queen* (2013) 249 CLR, 92, 208 [327], [329] (Crennan, Kiefel and Bell JJ).

<sup>389</sup> *Plaintiff S157* (2003) 211 CLR 476, [76]-[78]; Gageler, above n 67, 102.

<sup>390</sup> See discussion in Chapter I, Part B.3.

<sup>391</sup> *Palme* (2003) 216 CLR 212, 225 [46] (Gleeson CJ, Gummow and Heydon JJ).

<sup>392</sup> *Graham* (2017) 91 ALJR 890, 902 (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).

s 175 was designed to preserve the validity of assessments outside of the Part IVC proceedings.<sup>393</sup> The exhaustive appeal options available provided the basis for administrative accountability. The majority of Gummow, Hayne, Heydon and Crennan JJ firmly couched their conclusion on the operation of s 175 in those terms:<sup>394</sup>

Section 175 must be read with ss 175A and 177(1). If that be done, the result is that the validity of an assessment is not affected by failure to comply with any provision of the Act, but a dissatisfied taxpayer may object to the assessment in the manner set out in Part IVC of the [Tax Admin Act]; in review and appeal proceedings under Pt IVC the amount and all the particulars of the assessment may be challenged by the taxpayer... Where s 175 applies, errors in the process of assessment do not go to jurisdiction and so do not attract the remedy of a constitutional writ under s 75(v) of the *Constitution*.

The review proceedings offered exhaustive rights that involved appeals to the Australian Administrative Tribunal,<sup>395</sup> and provided for appeals to the Federal Court.<sup>396</sup> Accordingly, there was only a limited need for the narrow approach to construction.

Notably, despite the exhaustive review procedures in place, s 175 of the Tax Act still had its limitations. The interpretation of no-invalidity clauses is still a question of statutory construction.<sup>397</sup> This necessitates the application of all relevant principles of statutory interpretation.<sup>398</sup> The Court found that s 175 had no operation in circumstances of fraud or deliberate maladministration.<sup>399</sup> On its literal interpretation s 175 would appear to contemplate both. Even though there are alternative avenues of appeal available, the clause is still given a somewhat restrictive interpretation because of the application of the narrow approach to construction. Both fraud and deliberate maladministration reflect arbitrary exercises of power. It is presumed that the legislature did not intend to authorize this arbitrary exercise of power at the expense of individual rights. The rationale underpinning the narrow approach to construction is evident in the majority's reasoning and without clear words the Court would not interpret s 175 as extending so far as to contemplate fraud or deliberate maladministration.

Without any attempt at reconciling a broad no-invalidity clause, when no alternative mechanism to ensure administrative accountability is in place, the no-invalidity clause intrudes upon the place and

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<sup>393</sup> *Futuris* (2008) 237 CLR 146, 157 [25] (Gummow, Hayne, Heydon and Crennan JJ).

<sup>394</sup> *Ibid*.

<sup>395</sup> See *Tax Administration Act 1953* (Cth) div 4.

<sup>396</sup> *Ibid* div 5.

<sup>397</sup> *Futuris* (2008) 237 CLR 146, 156-7 [23]-[24] (Gummow, Hayne, Heydon and Crennan JJ) citing *Project Blue Sky* (1998) 194 CLR 355, 390-1 [93] (McHugh, Gummow, Kirby and Hayne JJ).

<sup>398</sup> *Plaintiff S157* (2003) 211 CLR 476, 490-1 (Gleeson CJ); *Project Blue Sky* (1998) 194 CLR 355, 390-1 [93] (McHugh, Gummow, Kirby and Hayne JJ); *Tasker v Fullwood* [1978] 1 NSWLR 20, 24.

<sup>399</sup> *Futuris* (2008) 237 CLR 146, 157 [25], (Gummow, Hayne, Heydon and Crennan JJ).

purpose of s 75(v) in the *Constitution*. It does so, by operating inconsistently with the rule of law in the same manner as a privative clause. The rule of law, in concert with a broader approach to administrative accountability can provide the normative basis for determining the strength of the application of the narrow approach to construction. Where a broad no-invalidity clause is operating to circumvent judicial review, because no alternative means of review are available, the right of an individual to have access to a court to correct errors of law and the need to prevent the exercise of arbitrary power warrant a strict application of the narrow approach to construction. If the no-invalidity clause was not read narrowly and was given its literal meaning, it would operate to create ‘islands of power’ by effectively classifying jurisdictional errors of law as non-jurisdictional and precluding them from review.

In an effort to provide clarity, an example is helpful. The no-invalidity clause may be read narrowly as preserving the validity of the decision until otherwise set aside by the issue of a constitutional writ. This potential reading of a broad no-invalidity clause is consistent with the existing case law on no-invalidity clauses and with the important Administrative law principle that a decision affected by jurisdictional error is no decision at all.<sup>400</sup> In this example, the no-invalidity clause operates to exclude the latter principle and maintains the validity of the decision unless and until the Court exercises its jurisdiction under s 75(v). A similar interpretative conclusion has been applied to ‘finality’ causes.<sup>401</sup> Indeed, in *Miah*, Gaudron and McHugh JJ applied the same approach to a poorly drafted no-invalidity clauses in s 69(1) of the Migration Act.<sup>402</sup> This understanding has the potential to resolve the difficulties posed by broad no-invalidity clauses in the face of no alternative means of ensuring administrative accountability.

## D Concluding Remarks

The rationale associated with the narrow approach to the construction of privative clauses applies with great force to jurisdictional errors.<sup>403</sup> If they are precluded from review, jurisdictional errors create islands of power that are immune from supervision and restraint. Facilitating arbitrary and unconstrained exercises of power. This is inconsistent with the accountability function of s 75(v) and, therefore, its place and purpose in the *Constitution*. For this reason, coupled with the application of the presumption of legality, privative clauses have always been construed narrowly. A broadly cast no-invalidity clause, in circumstances where no other accountability mechanisms exist, creates the same difficulty. The no-invalidity clause attempts to disguise an island of power as being an error of law within jurisdiction. In this way it has the same substantive effect as a privative clause. The application

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<sup>400</sup> *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597, 614-15 (Gaudron and Gummow JJ).

<sup>401</sup> See, eg *Re Marks; Ex Parte Saint* (2000) 204 CLR 158, 236 (Gummow J); *Probuild* (2018) 92 ALJR 248, 272 [94] (Edelman J); see also Bateman, above n 6, 498.

<sup>402</sup> *Miah* (2001) 206 CLR 57, 87-8 [103] (Gaudron J, McHugh J agreeing).

<sup>403</sup> *Probuild* (2018) 92 ALJR 248, 269-70 [86] (Edelman J).



of the narrow approach to construction, informed by the presumption of legality and the need to avoid unconstrained and arbitrary exercises of power, facilitates a reading of the no-invalidity clause that is consistent with the minimum provision of judicial review.

## VI. CONCLUSION

The purpose of a no-invalidity clause is to pronounce on the validity of administrative action. It does this by identifying either specific legislative requirements or the legislative requirements as a whole and purports to bring non-compliance with those legislative requirements within jurisdiction. The no-invalidity clause in *Futuris* was broad. It purported to validate decisions notwithstanding any failure to comply with the requirements laid out in the Tax Act. However, extensive appeal rights were available via Part IVC of the Tax Admin Act. The aim of the no-invalidity clause in s 175 of the Tax Act was to preclude review outside of the exhaustive procedures provided for by the legislation. The aim of the legislature was to contain appeal procedures to the channel provided by the legislation.

Judicial review, taken under s 75(v), cannot be abrogated by the legislature. It can, however, be shaped in a manner that is consistent with the place and purpose of s 75(v). The question of intrusion upon the minimum provision of judicial review is one of substance and degree. Ultimately, no question of inconsistency with the place and purpose of s 75(v) and the minimum provision of judicial review arises in *Futuris*, because of the extensive alternative appeal rights afforded to aggrieved persons. Administrative accountability is enforced via avenues other than judicial review and the jurisdiction conferred upon the High Court via s 75(v) is not impeded. The same can be said for the no-invalidity clause in *Palme*. Jurisdictional error remains available on grounds arising other than those associated with the provision of reasons by the Minister. The effect of s 501G(4) is not to remove, or circumvent the High Court's jurisdiction to conduct review. It operates to shape the manner of its exercise by altering the substantive law upon which it operates.

There are, however, limits beyond which a no-invalidity clause cannot reach. The place and purpose of s 75(v) will be impeded and the rule of law undermined, in circumstances where legislation includes a broad no-invalidity clause, and where there are no alternative mechanisms for ensuring administrative accountability. Where no such mechanisms are provided for, the broad no-invalidity clause will be inconsistent with the grant of limited jurisdiction and the broader principle of the rule of law. The application of all relevant principles of statutory construction, including the need to reconcile the inconsistency, will result in a narrow approach to the construction of the no-invalidity clause.

## VII. BIBLIOGRAPHY

### A *Journal Articles*

Aronson, Mark, 'Commentary on "The entrenched minimum provision of judicial review and the rule of law"' (2010) 21 *Public Law Review* 35

Aronson, Mark, 'Nullity' (2004) 40 *Australian Institute of Administrative Law Forum* 19

Aronson, Mark, 'Commentary on "The Entrenched Minimum Provision of Judicial Review and the Rule of Law"' by Leighton McDonald' (2010) 21 *Public Law Review* 35

Alderton, Matthew, 'When jurisdictional errors are not remedied: refusal of relief on discretionary grounds' (2015) 23(1) *Australian Journal of Administrative Law* 15

Basten, John, 'Jurisdictional Error after *Kirk*: Has it a future?' (2012) 23 *Public Law Review* 94

Bateman, Will, 'The Constitution and the substantive principles of judicial review: the full scope of the entrenched minimum provision of judicial review' (2011) 39 *Federal Law Review* 463

Beatson, Jack, 'The Scope of Judicial Review for Error of Law' (1984) 4 *Oxford Journal of Legal Studies* 22

Burton Crawford, Lisa, 'Who decides the validity of executive action? No-invalidity clauses and the separation of powers' (2017) 24 *Australian Journal of Administrative Law* 81

Buss, William, 'Andrew Inglis Clark's Draft Constitution, Chapter III of the *Australian Constitution*, and the Assist from Article III of the *Constitution of the United States* (2009) 33 *Melbourne University Law Review* 718

Campbell, Enid and Matthew Groves, 'Privative Clauses and the Australian Constitution' (2004) 4 *Oxford University Commonwealth Law Journal* 51

Chen, Bruce, 'The principle of legality: Issues of rationale and application' (2015) 41(2) *Monash University Law Review* 329

De Smith, Stanley, 'The prerogative writs' (1951) *Cambridge Law Journal* 40

French, Robert 'Constitutional Review of Executive Decisions: Australia's US legacy' (2010) 35 *University of Western Australia Law Review* 35

Gageler, Steven 'Impact of Migration Law on the Development of Australian Administrative Law' (2010) 17 *Australian Journal of Administrative Law* 92

Gouliaditis, Nicholas, 'Privative Clauses: Epic Fail' (2010) 34(3) *Melbourne university Law Review* 870

Green, Leslie, 'The Political Content of Legal Theory' (1987) 17 *Philosophy of the Social Sciences* 1

Groves, Matthew, 'Judicial Review of Administrative Action in the High Court of Australia' (2008) 33 *Queen's Law Journal* 327

Gummow, William, 'The scope of s 75(v) of the *Constitution*: Why injunction but no certiorari' (2014) 42(2) *Federal Law Review* 241

- Kerr, Duncan 'Privative Clauses and the Courts: Why and How Australian Courts have Resisted Attempts to Remove a Citizen's Right to Judicial Review of Unlawful Executive Action' (2005) 5 (2) *Queensland University of Technology* 195
- Kerr, Duncan and George Williams, 'Review of executive action and the rule of law under the Australian Constitution' (2003) 14 *Public Law Review* 219
- Kirk, Jeremy, 'The entrenched minimum provision of judicial review' (2004) 12 *Australian Journal of Administrative Law* 64
- Kowal, Giridhar, 'Jurisdictional error and no-invalidity clauses at State level: Does the High Court still hold all the cards?' (2015) 22 *Australian Journal of Administrative Law* 253
- Langford, Clare, 'The prerogative writs and the origins of English Administrative law' (2014) 88 *Australian Law Journal* 567
- Leeming, Mark, 'The riddle of jurisdictional error' (2014) 38 *Australian Bar Review* 139
- Lindsay, Robert, 'The Privative Clause and the Constitutional Imperative' (2012) 71 *Australian Institute of Administrative Law Forum* 84
- McDonald, Leighton 'The entrenched minimum provision of judicial review and the rule of law' (2010) 21 *Public Law Review* 14
- Noonan, Charles, 'Section 75(v), No-invalidity clauses and the Rule of Law' (2013) 36(2) *University of New South Wales Law Journal* 437
- O'Donnell, Benjamin, 'Jurisdictional error, invalidity and the role of the injunction in s 75(v) of the Constitution' (2007) 28 *Australian Bar Review* 291
- Reynolds, Daniel 'The constitutionalisation of administrative law: navigating the cul-de-sac' (2013) 74 *Australian Institute of Administrative Law Forum* 73
- Sackville, Ronald, 'The 2003 Term: The Inaccessible Constitution' (2004) 27 *University of New South Wales Law Journal* 66
- Saunders, Cheryl, 'Plaintiff S157/2002: A case-study in Common Law Constitutionalism' (2005) 12 *Australian Journal of Administrative Law* 115
- Spigelman, James, 'Public Law and the Executive' (2010) 34 *Australian Bar review* 10
- Spigelman, James 'The centrality of Jurisdictional Error' (2010) 21 *Federal Law Review* 77
- Stellios, James, 'Exploring the purposes of s 75(v) of the Constitution' (2011) 34 *University of New South Wales Law Journal* 70
- Wade, William, "Constitutional and Administrative Aspects of the Anisminic Case" (1969) 85 *Law Quarterly Review* 198
- Waller, Jacob, 'Gone but not Forgotten: In Defence of Hickman' (2018) 46 *Federal Law Review* 259.

## B Books

Aronson, Mark, Bruce Dyer and Matthew Groves, *Judicial Review of Administrative Action* (Thomson Reuters, 4<sup>th</sup> ed, 2009)

Aronson, Mark and Matthew Groves, *Judicial Review of Administrative Action* (Lawbook, 5<sup>th</sup> ed, 2013)

Cane, Peter and Leighton McDonald, *Principles of Administrative Law: Legal Regulation of Governance* (Oxford University Press, 2<sup>nd</sup> ed, 2008)

Creyke, Robin, John McMillan, *Control of Government Action: Text, Cases and Commentary* (Lexis Nexis Butterworths, 3<sup>rd</sup>, 2012)

Dicey, A V, *An Introduction to the Study of the Law of the Constitution* (MacMillan, 10<sup>th</sup> ed, 1959)

Gleeson, Murray, *The Rule of Law and the Australian Constitution* (ABC Books, 2000)

Goldsworthy, Jeffrey, *Parliamentary Sovereignty: Contemporary Debates* (Cambridge University Press, 2010)

Henderson, Edith, *Foundations of English Administrative Law: Certiorari and Mandamus in the seventeenth century* (Harvard University press, Cambridge Massachusetts, 1963)

Leeming, Mark, *Authority to Decide: The law of jurisdiction in Australia* (The Federation Press, 2012)

Wade, William, *Constitutional Fundamentals* (Stephens & Sons, 1980)

Zimmerman, Augusto, *Western Legal Theory: History, Concepts and Perspectives* (LexisNexis Butterworths, NSW, 1<sup>st</sup> ed, 2013)

## C Chapters in Books

Aronson, Mark, 'Jurisdictional Error Without the Tears' in Matthew Groves and H P Lee (eds), *Australian Administrative Law: Fundamentals, Principles and Doctrines* (2007)

Aronson, Mark, 'Jurisdictional Error without the Tears' in Matthew Groves and H P Lee (eds), *Australian Administrative Law: Fundamentals, Principles and Doctrines* (Cambridge University Press, 2007)

Aronson, Mark 'The Growth of Substantive Review: the Changes, their Causes and their Consequences', in John Bell et al, (eds), *Public Law Adjudication in Common Law Systems: Process and Substance* (Hart Publishing, 2016)

Geoffrey Kennett SC and David FC Thomas, 'Constitutional and Administrative Law Aspects of Tax' in Neil Williams (ed), *Key Issues in Judicial Review* (The Federation Press, 2014)

Jeremy Kirk SC, 'The Concept of Jurisdictional Error' in Neil Williams (ed), *Key Issues in Judicial Review* (The Federation Press, 2014)

John Basten, 'Judicial review of Executive Action: Tiers of Scrutiny or Tears of Frustration?' in Neil Williams (ed), *Key Issues in Judicial Review* (The Federation Press, 2014)

Keane, Patrick, 'Judicial Power and the Limits of Judicial Control' in Peter Cane (ed), *Centenary Essays for the High Court of Australia* (LexisNexis, 2004)

Mason, Anthony, 'The analytical Foundations, Scope and Comparative Analysis of the Judicial Review of Administrative Action' in Geoffrey Lindell (ed), *The Mason Papers* (Federation Press, 2007)

Jeremy Kirk, 'Administrative Justice and the Australian Constitution' in Robyn Creyke and John McMillan (eds), *Administrative Justice - The Core and the Fringe* (Australian Institute of Administrative Law, 2000).

## D Cases

*Australian Coal and Shale Employees Federation v Aberfeld Coal Mining Co Ltd* (1942) 66 CLR 161

*Australian Communist Party v The Commonwealth* (1951) 83 CLR 1

*Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147

*Annetts v McCann* (1990) 170 CLR 596

*APLA Ltd v Legal Services Commissioner* (2005) 224 CLR 322

*Attorney-General (NSW) v Quin* (1990) 194 CLR 355

*Attorney-General (Vic) v The Commonwealth* (1945) 71 CLR 237

*Bank of New South Wales v The Commonwealth* (1948) 76 CLR 1

*Baxter v New South Wales Clicker's Association* (1909) 10 CLR 114

*Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651

*Bros Bins Systems Pty Ltd v Industrial Relations Commission of New South Wales* (2008) 74 NSWLR 257

*Caltex Oil (Australia) Pty Ltd v Best* (1990) 170 CLR 516

*Church of Scientology v Woodward* (1982) 154 CLR 25

*Clancy v Butchers' Shop Employees Union* (1904) 1 CLR 181

*Craig v South Australia* (1995) 184 CLR 163

*Coal Miner's Industrial Union of Western Australia v Amalgamated Collieries of Western Australia Ltd* (1960) 104 CLR 437

*Coco v The Queen* (1994) 179 CLR 427

*Darlington Casino Ltd v New South Wales Casino Control Authority* (1997) 191 CLR 602

*David Jones Finance & Investments Pty Ltd v Federal Commissioner of Taxation* (1991) 28 FCR 484

*Deputy Commissioner of Taxation v Richard Walter Pty Ltd* (1995) 183 CLR 168

*Electrolux Home Products Pty Ltd v Australian Worker's Union* (2004) 221 CLR 309

*Federal Commissioner of Taxation v Futuris Corporation Ltd* (2008) 237 CLR 146

*Fish v South 6 Holdings Ltd* (2006) 225 CLR 180

*F J Bloeman Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 360

*Graham v Minister for Immigration and Border Protection* (2017) 91 ALJR 890

*Haneef v Minister for Immigration and citizenship* (2007) 161 FCR 40

*Harvey v Commissioner of State Revenue* [2015] QCA 258

*Hockey v Yelland* (1984) 157 CLR 124

*Hossain v Minister for Immigration and Border Protection* (2018) 92 ALJR 780

*In Re Gray; Ex parte Marsh* (1985) 157 CLR 351

*Jarrat v Commissioner of Police for New South Wales* (2005) 224 CLR 44

*Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531

*Lee v NSW Crime Commission* (2013) 251 CLR 196

*Marbury v Madison* (1803) 5 US 137

*Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597

*Minister for Immigration and Ethnic Affairs v Yusuf* (2001) 206 CLR 323

*Morris v The Queen* (2013) 249 CLR 92

*Parisienne Basket Shoes Pty Ltd v Whyte* (1938) 59 CLR 369

*Plaintiff M47/2012 v Director General of Security* (2012) 251 CLR 1

*Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 316

*Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476

*Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* (2018) 92 ALJR 248

*Public Service Association (SA) v Federated Clerks' Union* (1991) 173 CLR 132

*Re Cram; Ex parte New South Wales Colliery Proprietors Association Ltd* (1987) 163 CLR 117

*Re McBain; Ex Parte Bishops Australian Catholic Bishops Conference* (2002) 209 CLR 372

*Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 77 ALJR 1165

*Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1

*Re Ministers for Immigration & Multicultural Affairs & Indigenous Affairs; Ex parte Palme* (2003) 216 CLR 212

*Re Pacific Coal Pty Ltd; Ex parte Construction, Forestry, Mining and Energy Union* (2000) 203 CLR 346

*Re Refugee Tribunal; Ex parte Aala* (2000) 204 CLR 82

*R v Commonwealth Court of Conciliation and Arbitration; Ex parte Whybrow* (1910) 11 CLR 1

*R v Coldham; Ex parte Australian Worker's Union* (1983) 153 CLR 415

*R v Hickman; Ex parte Fox* (1945) 70 CLR 598

*R v Jukes* (1800) 8 TR 542

*R v Moreley* (1760) 2 Burr. 1040

*R v Murray; Ex parte Proctor* (1949) 77 CLR 387

*R v Plowright* (1685) 3 Mod. 94

*R v Secretary of State for the Home Department; Ex parte Simms* [2000] 2 AC 115

*R v Watson; Ex parte Armstrong* (1976) 136 CLR 248

*Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252

*Sanders v Snell* (1998) 196 CLR 329

*SDAV v Minister for Immigration & Multicultural affairs* (2003) 199 ALR 43

*Street v Queensland Bar Association* (1989) 168 CLR 461

*Svecova v Industrial Commission of New South Wales* (1991) 39 IR 328

*State of New South Wales v Kable* (2013) 252 CLR 118

*Stokes v Federal Commissioner of Taxation* (1996) 32 ATR 500

*SZFDE v Minister for Immigration and Citizenship* (2007) 232 CLR 189

*Tasker v Fullwood* [1978] 1 NSWLR 20

*The Colonial Bank of Australasia v Robert Willan (Victoria)* [1874] UKPC 28

*The Tramways Case [No 1]* (1914) 18 CLR 54

*Thomas v Mowbray* (2007) 233 CLR 307

*Yonkers v United States* 320 US 685



## E      *Legislation*

*Australian Constitution*

*Acts Interpretation Act 1901 (Cth) Conciliation and Arbitration Act 1904 (Cth)*

*Income Tax Assessment Act 1936 (Cth)*

*Judiciary Act (Cth)*

*Migration Act 2001 (Cth)*

*National Security (Coal Mining Industry Employment) Regulations 1941 (Cth)*

*Migration Reform (Transitional Provisions) Regulations 1994 (Cth)*

*Renewable Energy (Electricity) Act 2000 (Cth)*

*Petroleum Resource Rent Tax Assessment Act 1987 (Cth)*

*Taxation Administration Act 1953 (Cth)*

*Telecommunications Act 1997 (Cth)*

## F      *Parliamentary Materials*

Commonwealth, Parliamentary Debates, House of Representatives, 26 September 2001, 31559 – 61

New South Wales, Legislative Assembly, Parliamentary debates (Hansard), 12 November 2001, 6542

## G      *Other*

The Administrative Review Council's Discussion Paper, *The Scope of Judicial Review*, 2003

*Official Record of the Convention Debates of the Australasian Federal Convention*, Melbourne, 4 March 1898

Kirk, Jeremy 'The concept of jurisdictional error' (paper presented to Constitutional and Administrative Law Section, New South Wales Bar Association, 30 May 2012).